

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**





# No. 74-1762

BRLS

**United States Court of Appeals**  
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

*Petitioner,*

v.

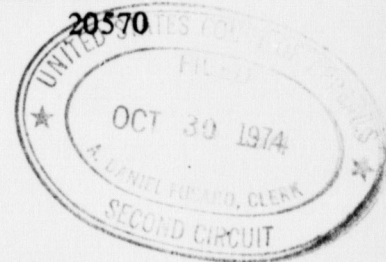
S.H. KRESS COMPANY,

*Respondent.*

On Application for Enforcement of an Order of  
The National Labor Relations Board

APPENDIX  
Volume I

ELLIOTT MOORE,  
*Deputy Associate General Counsel,*  
National Labor Relations Board.  
Washington, D.C.



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APPENDIX  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
SECOND REGION

\*\*\*\*\*  
S. H. KRESS & COMPANY  
Employer  
and  
DISTRICT 65, NATIONAL COUNCIL  
DISTRIBUTIVE WORKERS OF AMERICA  
Petitioner  
\*\*\*\*\*

Case Nos.  
2-CA-13057  
2-RC-15824

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

In the Matter of: S. H. Kress and Company

Case Nos. 2-CA-13057  
2-RC-15824

	Petition filed
	Stipulation
	Tally ballots
3.27.72	Regional Director's Decision and Direction of Election, dated
5.11.72	Employer's Objections to the Conduct of Election and to the Conduct Affecting the results of the Election dated
7.28.72	Regional Director's Supplemental Decision (with attachments) dated
8. 3.72	Employer's Telegram Requesting Extension of Time for filing Regional Director's Request for Review, dated
8. 4.72	Charging Party's Telegram Opposing Employer's Request for Extension of Time to file Regional Director's Request for Review, dated
8. 4.72	Board's Telegram granting extension of time to file Request for Review, dated





- 8.31.72 Employer's Request for Review of the Regional Director's Supplemental Decision, (with attachments), dated
9. 1.72 Employer's Corrected Pages of Request for Review, dated
- 10.16.72 Board's Telegram granting in part and denying in part The Request for Review, dated and remanding to Regional Director for further hearing
- 10.24.72 Employer's Requests that Remand Hearing directed by the Board be held before Trial Examiner rather than Hearing Officer, received
- 10.27.72 Regional Director's Notice of Hearing on Objections and Challenged Ballots, dated
11. 1.72 Acting Regional Director's Order Rescheduling Hearing, dated
12. 6.72 Hearing Opened
12. 8.72 Regional Director's Telegram Requesting Permission to Authorize Reisinger to Testify concerning his version of the Events and to Refute the Statement made by the witness, received
12. 8.72 Board's Telegram granting Request for Permission to Authorize Reisinger to Testify, dated
- 12.26.72 Hearing Closed
- 12.27.72 Employer's Special Appeal by the Employer from Hearing Officer's Denial of Employer's Request to File Brief at Close of Hearing, dated
1. 1.73 Board's Telegram Denying Employer's Special Appeal from Hearing Officer's Denial of Employer's Request to File Brief at Close of Hearing, dated
- 3.26.73 Hearing Officer's Report and Recommendations on Challenged Ballots, dated
4. 3.73 Employer's Telegram granting Employer's Extension of Time, dated
- 4.25.73 Employer's Exceptions to Hearing Officer's Report and Recommendations on Challenged Ballots, received

7. 8.73	Revised Tally of Ballots issued
7.12.73	Regional Director's Certification of Representative, dated
8. 1.73	Charge filed
8.31.73	Complaint and Notice of Hearing, dated
9.10.73	Respondent's Answer, received
9.19.73	General Counsel's Motion for Summary Judgment, (with attachments) dated
9.19.73	General Counsel's Petition in Support of Motion for Summary Judgment, dated
10. 4.73	Board's Order Transferring Proceeding to the Board and Notice to Show Cause, dated
10.17.73	Respondent's Response to Notice to Show Cause, dated
10.29.73	General Counsel's Response to Respondent's Reply to Motion for Summary Judgment, dated
3.26.74	Decision and Order of the National Labor Relations Board, dated

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S. H. KRESS & COMPANY <sup>1/</sup>

Employer

and

DISTRICT 65, NATIONAL COUNCIL  
DISTRIBUTIVE WORKERS OF AMERICA

Petitioner

Case No. 2-RC-15824

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### DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before a hearing officer of the National Labor Relations Board. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connections with this case to the undersigned Regional Director.

Upon the entire record in this case, the Regional Director finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. <sup>2/</sup>

2. The labor organization involved claims to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

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<sup>1/</sup> The name of the Employer appears as amended at the hearing.

<sup>2/</sup> The Employer, a Tennessee corporation, which operates retail stores in New York and other states, is engaged in the sale of general merchandise. During the past year, the Employer's gross revenues exceeded \$500,000. During the same period, it purchased goods valued in excess of \$50,000 directly from suppliers located outside the State of New York.

4. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act: <sup>3/</sup>

All employees employed by the Employer at its retail store located at 1915 Third Avenue, New York, New York, including cashiers, porters, maintenance, stock, food service, sales and office clerical employees, but excluding display employees, <sup>4/</sup> professional employees, guards and supervisors <sup>5/</sup> as defined in the Act.

- <sup>3/</sup> The parties stipulated that the unit was appropriate. The record reveals that there are approximately 50 employees in said unit.
- <sup>4/</sup> The parties stipulated that display department employees be excluded from the unit on the ground that these employees do not share a community of interest with other employees because their work requires training, art talent and art experience not required for other positions. The record reveals that there are no display department employees employed at the present time, and further reveals that display work is now being done by supervisory personnel, i. e., W. Grotheer is responsible for the window displays, and department managers are responsible for displays in the area each supervises. As the stipulation is not inconsistent with the record I shall accept the stipulation.
- <sup>5/</sup> The parties stipulated and it appears that James Williams, store manager, Lawrence Jones, W. Grotheer, and Sylvester Irvin, assistant store managers, have independent authority to assign work and direct employees, and are supervisors within the meaning of the Act. Accordingly, they will be excluded from the unit. The parties further stipulated that Margaret Gordin, Sophia Oliveri, Josie Guzman, Helen Kavasansky, Hayde Feliciano and Noel Hernandez are department managers, and should be excluded as supervisors within the meaning of the Act. The record discloses that the six department store managers effectively recommend recall, layoffs, transfers, wage increases and discharges, make work and vacation schedules, train and direct employees, and attend meeting of supervisory personnel. On the basis of the record and the stipulation of the parties, I find that the above named employees are supervisors within the meaning of the Act, and they shall be excluded from the unit.



## DIRECTION OF ELECTION

An election by secret ballot will be conducted by the undersigned Regional Director among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.<sup>6/</sup> Those eligible shall vote whether (or not) they desire to be represented for collective-bargaining purposes by District 65, National Council Distributive Workers of America.

Dated March 27, 1972

at New York, New York

/s/ Ivan C. McLeod

Regional Director, Region 2  
National Labor Relations Board  
26 Federal Plaza, Room 3614  
New York, New York 10007

<sup>6/</sup> In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have

6/ (Continued) access to a list of voters and their addresses which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236; N. L. R. B. v. Wyman-Gordon Company, 394 U.S. 759. Accordingly, it hereby is directed that an election eligibility list, containing the names and addresses of all the eligible voters, must be filed with the Regional Director for Region 2, within 7 days of the date of this Decision and Direction of Election. In order to be timely filed, such list must be received in the Regional Office, Federal Building, 26 Federal Plaza, Room 3614, New York, New York 10007, on or before April 3, 1972. The Regional Director shall make the list available to all parties to the election. No extension of time to file this list shall be granted by the Regional Director except in extraordinary circumstances, nor shall the filing for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

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[Dated 7/28/72]

SUPPLEMENTAL DECISION

Pursuant to a Decision and Direction of Election issued by the Regional Director for the Second Region on March 27, 1972, an election by secret ballot was held on May 5, 1972 in a unit composed of all employees employed by the Employer at its retail store located at 1915 Third Avenue, New York, New York, including cashiers, porters, maintenance, stock, food service, sales and office clerical employees, but excluding display employees, professional employees, guards and supervisors as defined in the Act. The Tally of Ballots served upon the parties showed the following:

Approximate number of eligible voters . . . . .	51
Void ballots . . . . .	0
Votes cast for Petitioner . . . . .	25
Votes cast against participating labor organization . . . . .	23
Valid votes counted . . . . .	48
Challenged ballots . . . . .	6
Valid votes counted plus challenged ballots . . . . .	54
Challenges are sufficient to affect the results of the election.	

The Petitioner, herein called the Union, challenged the votes of two employees on the grounds they were not in the unit and the Board challenged the votes of four employees because their names were not on the eligibility list.

On May 12, 1972, the Employer filed timely objections to the election, copies of which were served on the parties. The objections allege the following:

1. The Union engaged in deliberate trickery and misrepresentations of material facts including, the amount of union dues and other charges, wage increases, benefits, pay rates and pay plans in union facilities, union benefits and services, and it did so at a time when said misrepresentations could not be answered and further coerced employees and so lowered campaign standards that the uninhibited desires of the employees could not be determined.

2. The Union circulated false information about the Employer and other material facts, and injected issues designed to instill racial discrimination and hatred into its campaign.

3. The Union coerced employees with threats of physical injury and economic harm and by offering and giving unlawful inducements and benefits to force or induce employees to vote for the Union.

4. The Union engaged in activity to convince employees that the Federal and local governments favored the Union.

5. The Union engaged in electioneering and other interference in and around the polling places during the voting.

6. The Union coerced employees into voting for the Union by falsely implying to voters that it had ways of knowing how employees voted and it induced employees to vote for it by spreading false rumors of victory in advance and by promising employees benefits if it won.

7. The employees did not have a free choice in the election because supervisor's actions in support of the union coerced employees.

8. The holding of the election was improper because of the participation, instigation and sponsorship of the union by supervisors, and the Board should have dismissed the proceeding in view of such supervisory activity.

Pursuant to Section 102.69 of the Board's Rules and Regulations, the undersigned caused an investigation to be made of the objections.



During the investigation, the parties were afforded a full opportunity to submit evidence bearing upon the issues. An independent inquiry also was caused to be made. The results of the investigation are discussed below.

### THE OBJECTIONS

#### OBJECTION 1

In this objection the Employer claims that the Union engaged in deliberate trickery and misrepresentations with respect to certain material facts, which it specified, at a time when these misrepresentations could not be rebutted.

In support of this allegation the Employer submitted a copy of a leaflet distributed by the Union outside the store the day before the election and points to a statement therein that " . . . the initiation fee to be a member of this Union is \$5.00 and the dues are in proportion to your weekly salary." <sup>1/</sup> This is a misrepresentation according to the Employer because the Union constitution provides for an initiation fee of \$20. Further, the Employer maintains that as various types of assessments set forth in the constitution are not in proportion to employees' weekly salary, though the generally established dues are, there is misrepresentation and trickery by the Union on this ground too.

The Union explains that its initiation fee through organization is \$5.00, and that the \$20.00 amount set forth in its constitution pertains to employees who join at a later date. No evidence was adduced to establish this statement as untrue. I find no merit to this objection.

As for the Employer's allegation that the various types of assessments by the Union are not in proportion to employees

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<sup>1/</sup> The leaflet is appended hereto as Attachment A.

"weekly salaries", as claimed by the Union, a reading of the leaflet in issue shows that the Union merely stated therein that "dues" were in proportion to salary. An examination of the Constitution of the Union (Part IV, Article C, Section 2(a)(1)) reveals that "monthly dues" are in proportion to "total" earnings. However, the Employer has in mind another section of the Union's Constitution which states: All initiation fees, assessments, fines, or other obligations owing by any member to the Union shall be merged with and become part of the dues owing by that member. (Part IV, Article C, Section 2(b)(4)).

From the foregoing it is clear that the Union was not incorrect when it stated that dues were in proportion to an employee's salary. The Union's constitution also has a provision which broadens the definition of dues to include initiation fees, fines and assessments, and these financial obligations do not necessarily correlate with employees' earnings. However, I do not find the Union's failure in the circumstances herein, to set out this qualification to its basic formula of prorating dues, to constitute such a departure from the facts as to have prevented the employees from exercising a free choice of representatives. For one thing I note that among the non-prorated items, the initiation fee was correctly publicized by the Union as a fixed figure applicable to all the Employer's employees, and as not varying with earnings. Thus, there was no misrepresentation on this point. Further, since "dues" in the most familiar usage of the term are in fact proportionately assessed, there was at best only an ambiguity in the Union's failure to advert also to the more comprehensive definition. Finally, "dues" became a campaign issue which the Employer pointedly discussed in its relevant aspects, in the campaign literature it distributed to employees,



actually quoting in full that section of the Union's Constitution wherein dues encompass various assessments, and further describing these Union assessments in absolute and not proportional terms.<sup>2/</sup> Employees therefore had an opportunity to, and reasonably could evaluate the issue. In all the circumstances I find no merit to this objection.

The Employer alleges that the Union also misrepresented initiation fees and fines of other unions (emphasis supplied), by the following Union statement:

This we say in answer to the falsehood circulated by the Company that we would have to pay an initiation fee of \$100.00, \$200.00 and \$500.00 to the Union that wishes to represent us. We don't believe that there exists a union in the United States that would tax their members these amounts and least of all our Union.

The Employer, in support of its claim of Union misrepresentation, referred generally to Board decisions which it claimed contained examples of unions fining members more than \$100.00 and further specifically listed six international unions which, according to its "understanding", have provisions for initiation fees of \$100.00, it is clear from a reading of the leaflet that the Union is merely expressing an opinion, albeit one of disbelief, on the practices of other unions and goes on to say with some emphasis apropos its own policy that it, "least of all", would charge such an amount. I find that this statement by the Union, considered in its entirety, does not raise a substantial issue and I find no merit to this objection.

Not only does the Employer contest the accuracy of the Union's stated disbelief in the existence of the large specified initiation fees

<sup>2/</sup> The Employer's position on the Union's dues and assessments was set out in a campaign pamphlet entitled "Do You Know."

of other unions, as discussed immediately above, but the Employer, preliminarily, takes issue with the Union's attributing to it, the Employer, the statement that employees would have to pay to the Union initiation fees of \$100.00, \$200.00 and \$500.00, and it denies ever making any such statement.<sup>3/</sup> Be that as it may, the conduct complained of falls well within the permissible bounds of campaign propaganda and I so find.<sup>4/</sup>

Additionally, the Employer claims that employees were told by the Union that they would get the whole package of benefits outlined in "The District 65 Security Plan" a Union sponsored plan which provides health, welfare and related benefits to employees and that this plan is part of all the contracts which District 65 had (emphasis supplied). In fact, however, according to the Employer the Plan does not exist in Union contracts with at least two named employers, the Museum of Modern Art and the National Letter Shop.<sup>5/</sup> The gravamen of the Employer's allegation is that the Union was therefore misrepresenting the facts in claiming the universal existence of these benefits in its contracts.

To support this position the Employer submitted affidavits from two employees who stated that Abreu, the Union's representative had explained the Security Plan to a meeting of store employees in

<sup>3/</sup> It is not entirely clear that the Employer formally is claiming that this statement constitutes objectionable conduct. Nevertheless, I shall treat it as part of the Employer's objections.

<sup>4/</sup> Hollywood Ceramics Company, Inc., 140 NLRB 221, particularly at 223 and 224, footnote 6.

<sup>5/</sup> The Employer bases this particular allegation on its interpretation of material in two issues of the "Distributive Worker", the organ of the National Council, Distributive Workers of America, with which District 65 is affiliated.



about March 1972 and had informed the employees that the Union had such benefits in all its contracts and that it would get the same benefits for the store employees. The Employer also submitted an affidavit from its Director of Manpower, Steven Briar who states he was told by three named employees, that they had heard the Union representative, apparently Abreu, make what was in substance a similar claim. <sup>6/</sup> The three of the five employees who were subsequently interviewed by a Board agent denied they ever heard the Union make this claim.

Abreu denies he or the Union ever informed employees that "all" Union contracts contained the benefits in question.

Apropos the two firms named by the Employer as not having Security Plan provisions in their District 65 contracts, the Union states that one of the employers, the Museum of Modern Art, has no contract with District 65 but has a contract rather with Local 1, a labor organization independent of District 65 but which like District 65 is affiliated with the same national union, namely the Distributive Workers of America. An examination of the October, 1971 issue of the "Distributive Worker," to which the Employer specifically adverts as the source of its allegation, clearly refers to Local 1 as the certified bargaining agent and as the contracting union. The Employer's allegation with respect to the Museum of Modern Art was therefore itself seriously misleading. The second firm named by the Employer, the National Letter Shop, is according to the Union a member of an employer association which has a contract with District 65 which contains the Security Plan. In addition, as pointed out by the Union, the March 1972 issue of the "Distributive Worker" which forms the basis

<sup>6/</sup> There is a lack of preciseness on what the Union actually said to employees in the statement made to Briar by two of the three employees whom he cites.

for the Employer allegation, merely reports the wage gains achieved after a strike at National Letter Shop. The article, which is brief, makes no attempt to describe any other terms or benefits.

To conclude, I find the evidence insufficient to establish the Employer's first allegation, that the Union specifically told employees all its contracts contained its Security Plan. Assuming arguendo that the Union had made such a claim, the Employer has still failed to meet its burden of establishing its related allegation that the claim is inaccurate, to say nothing of proving that the inaccuracy, were there one, constituted so substantial a departure from the truth that it made a fair election impossible under the standards set out in Hollywood Ceramics.<sup>7/</sup> The only evidence submitted by the Employer of the existence of non-Security Plan shops was based on a speculative interpretation by the Employer of items in the newspaper of the national organization with which the Union is affiliated, an interpretation which, upon investigation turned out to be misleading and inaccurate. I accordingly find the objection on the District 65 Security Plan to be without merit.<sup>8/</sup> Further and for reasons already stated, I find objection 1 to be without merit and it hereby is overruled.

## OBJECTION 2

This objection alleges that the Union circulated false and misleading information about the Employer and injected issues designed

<sup>7/</sup> 140 NLRB 221

<sup>8/</sup> There is this further consideration that what the Union could obtain for employees as fringe benefits became a campaign issue which the Employer discussed in its literature to employees pointing out to them that the Union could guarantee them in the Employer's phrase, "absolutely nothing" and that the law only required that the Employer bargain with the Union with no guarantee as to what would come out of the bargaining. In these circumstances, it is my view that the employees were in a position to evaluate the Union's claims with respect to wage and any and all fringe benefits as campaign propaganda.



to instill racial discrimination and hatred into its organizing campaign.

The evidence submitted by the Employer to support this allegation consisted essentially of one incident. On or about Tuesday, May 2, 1972, Herman Badillo, a member of the United States Congress, and Irma Santaella, a Commissioner of the New York State Human Rights Commission were brought into the store by the Union to meet some of the employees at their work stations <sup>9/</sup>, and during the course of the visit Congressman Badillo is alleged to have made certain objectionable statements. It appears that Congressman Badillo greeted some employees; urged some employees to vote for the Union and allegedly advised them they would get more money if they voted for the Union; and, according to an Employer representative, stated that the Employer did not employ Puerto Ricans as supervisors. The Employer says this last statement is not true and that it does, in fact, employ Puerto Ricans as supervisors. Mario Abreu, a vice president of the Union who was responsible for the Union's organizing campaign at the store escorted Congressman Badillo through the store. Abreu does not recall any statement by Congressman Badillo about the employment of Puerto Rican supervisors but admits that Congressman Badillo "may" have made such a statement because as Abreu put it "this is one of his fights". <sup>10/</sup>

In my Decision and Direction of Election referred to above, I found on the basis of the record and the stipulation of the parties that six named department managers were supervisors within the

<sup>9/</sup> Most of the employees work as sales personnel in a store that is open to the public.

<sup>10/</sup> It appears that Congressman Badillo and Irma Santaella are of Puerto Rican descent as are many of the employees in the unit.

meaning of the Act. Several of these have names that unmistakably are Spanish.

Assuming, without determining, that Congressman Badillo made the statement on the absence of Puerto Rican supervisors attributed to him, it was clearly the kind of statement which could be independently evaluated by employees as campaign propaganda since the employees came in frequent contact with supervisors of Puerto Rican ancestry. I find this objection to be without merit.

### OBJECTION 3

The Employer alleges in this objection coercion and threats of force and physical injury and the offering and giving of unlawful inducements and benefits to force or induce employees to vote for the Union. In support of the allegation that threats of force were made by the Union the Employer submitted a statement from an employee who claimed, in turn, that on about March 29, 1972, he had been told by a second employee that the latter had heard a third employee, allegedly working for the Union state that the Union had a plan to disrupt the store and that employees would see bloodshed in the event the Union lost the election. The same second employee is the source of the Employer's allegation that the Union at a meeting on March 29, 1972 told employees it had available a gang of men whom the Union could bring into the store to help it win the election. Those hearsay statements of the Employer's witness not only receive no corroboration from any other source but their substance was denied by the employee who allegedly supplied the information to the Employer's witness. <sup>11/</sup> I find the objection to be without merit.

To substantiate its allegation of unlawful Union inducements the Employer presented photostatic copies of checks to employees from

<sup>11/</sup> I would note that the second allegation, if true is as much open to a lawful interpretation as one that is unlawful.



the Union and a statement by an employee that he had been offered a round trip to Puerto Rico with all expenses paid if he would vote for the Union. The investigation established that the checks in question were given to employees who took time off to come to the Regional office for the conference and hearing relative to the petition herein. This payment was reimbursement for pay employees did not receive from the Employer and in the circumstances does not constitute a basis for setting aside the election.

As for the allegation of an offer by the Union to an employee, of a free trip to Puerto Rico in return for his vote, the employee in question, Bernardo Martinez, says he was told by employee Sonia Morales, in the presence of employee Delia Melendez that the Union would give him a round trip to Puerto Rico with all expenses paid for 7 days if he voted for the Union. Morales denies she ever made such a statement to Martinez and that the Union made such a statement to her. Melendez denies that she heard any such promise made. Mario Abreu, vice president of the Union in charge of its organizing campaign denies having authorized any employee to make such a promise and is unaware of any such promise. There is no claim that any other employee was ever offered such a trip nor did the investigation adduce any such evidence. In the absence of any corroboration I find this allegation cannot be sustained and I overrule this objection.

#### OBJECTION 4

This objection alleges that the Union engaged in activity designed to convince employees that government officials favored the Union and desired them to vote for the Union. In support of this allegation the Employer relies on the Union-sponsored and Union-escorted visit to the store by Congressman Badillo and Commissioner Santaella,

already described above under Objection 2. There is no evidence that these public officials told any employee they were there in a representative capacity or that they were speaking for any government agency, or that they told employees that any government agency favored the Union, and no such inference may be drawn lightly from their mere presence and advocacy of unionization. Further, nothing they said to employees may be deemed coercive or of such an objectionable nature that setting aside the election would be justified. <sup>12/</sup> For these various reasons I find the objection without merit.

#### OBJECTION 5

The Employer in this objection allèges electioneering in and around the polling place during the voting.

The Employer submitted that Mario Abreu, the chief Union representative, stationed himself at the information or service desk on the street floor very close to the foot of the stairs, which in turn was used by employees to reach the second floor where the poll was located, and spoke to employees as they were going up to vote. The stairs in question led from the street floor, which constitutes the main selling floor, to the mezzanine which contains the office overlooking the main selling floor and from a small landing on the mezzanine the stairs then led up to the second floor which contains the ladies' lounge, the stock room and some office space where the voting took place between the hours of 2:30 pm to 5:00 pm.

The Board agent in charge of the election advised the parties that there would be no electioneering on the mezzanine and second floor; on the stairs leading thereto; and in the area at the bottom of the stairs including, apparently, the nearby information or service desk, which at its nearest point is about four feet from the stairs.

<sup>12/</sup> Cf. Dean Industries, Inc., 162 NLRB 1078



George Culbertson, vice president of Kress, states he saw Abreu standing for about 20 minutes, about the time the election started, at the information (or service) desk on the street floor which the employees had to pass in order to go to vote, and speak to employees Carmen Valentin, Mary Gomez, and Alfonso Narvaez as they were going by to vote. Bernardo Martinez, an employee whose vote was challenged, states that he saw Abreu at the information desk speaking to Valentin and Gomez as they were going by to vote. The Employer also submitted an affidavit from employee Porfirio Fernandez, who voted without challenge, that when he, Fernandez, was going to vote, he was stopped by Abreu, who was standing "right by the staircase leading up to the voting area" and who asked him to vote for the Union.

Abreu admittedly spend some time at or close by the lunch counter during the polling hours but denies he spoke to any employee at or near the service desk and maintains he limited himself to the lunch counter and other neutral areas for the period of time he was in the store.

When questioned by a Board agent, Gomez stated that she saw Abreu at the lunch counter and did not see or speak to him at the information desk. Valentin says she did not talk with Abreu before she went to vote and spoke with him only after she had voted and not near the service desk. Narvaez was not available for interview when the Board agent visited the store. He apparently works on Saturdays only. His vote was challenged but as noted below, both parties agree he is an ineligible voter because of his security functions.

Fernandez, who speaks very poor English, was interviewed by a Spanish-speaking Board agent who spoke to him in Spanish and who asked to be taken to the exact physical location where he had been solicited by Abreu and to which he had referred as "right by the

staircase." (Fernandez had repeated to the Board agent that the solicitation occurred near the staircase). Fernandez took the Board agent to a spot about 10 feet from the service desk in the direction of the lunch counter, and about 5 feet from the lunch counter and placed this as his point of contact with Abreu. <sup>13/</sup>

During the election the Board agent patrolled the stairs including the area at the service desk about five or six times and did not see Abreu there at these times. I find it of some significance that Culbertson, the Employer's vice president, who states he saw Abreu electioneering in the service area, admittedly made no effort to bring the matter to the attention of the Board agent although he was aware of the fact that the area was out of bounds.

It is my view that in all the foregoing circumstances including the denials of the employees involved, and more particularly the failure of the designated high Employer official to bring the alleged misconduct, though aware of it, to the attention of one of the several Board agents conducting the election and further, the relative remoteness of the place where Abreu electioneered from the actual poll -- the allegations of this objection do not constitute a sufficient basis for setting aside the election.

This conclusion is buttressed by an examination of pertinent Board decisions. In the lead case in this area, Milchem, Inc. <sup>14/</sup> the Board codified its policy on conversations, whether electioneering or not, between parties to the election and employees preparing to vote and held that such conduct constituted grounds for setting aside an election. The rule of Milchem was explained in a subsequent

<sup>13/</sup> Between the solicitation point and the service desk there stands a row of telephones and then an open area of perhaps 6 feet or so.

<sup>14/</sup> 170 NLRB 362



case by the Board where it said: "the Milchem rule does not in any event apply to conversations with prospective voters unless the voters are, as was not true here, in the polling area or in line waiting to vote. <sup>15/</sup> (Emphasis supplied)

Assuming, arguendo, that Abreu engaged in the conversations and/or electioneering attributed to him by the Employer, it is clear the incidents did not occur in the line waiting to vote, nor, since the conversations took place at the service desk two floors from the poll, can they be construed as occurring in the "polling area" under any fair reading of that term. <sup>16/</sup>

The only problem, in my opinion, stems from the fact the activities complained of occurred within the no-electioneering area fixed by the Board agent. The situs of the alleged conversations, the service desk on the street floor, was on the fringe of the proscribed area and rather remote from the actual voting and well out of sight of the poll. Assuming that Abreu did in fact speak to these employees at that point, the facts here are clearly distinguishable from Star Expansion <sup>17/</sup> where, too, a union representative electioneered within the boundaries fixed by the Board agent and the Board set the election aside. Star Expansion involved "substantial electioneering in close proximity to the polls, in disregard of the Board agent's instructions with respect to the no-electioneering area." <sup>18/</sup> In that case the facts were that the union representative persisted in electioneering notwithstanding the Board agent's instructions to him, on three separate occasions, that he leave the proscribed area. Nothing

<sup>15/</sup> Harold W. Moore d/b/a Harold W. Moore & Son, 173 NLRB 1258

<sup>16/</sup> Compare the facts in Moore, supra.

<sup>17/</sup> Star Expansion Industries Corporation, 170 NLRB 362

<sup>18/</sup> Moore, supra.

like that occurred in the instant case where there was merely the usual pre-polling statement to the assembled parties, made by the Board agent with regard to electioneering boundaries.<sup>19/</sup> Further distinguishing Star Expansion, the conduct complained of did not occur in close proximity" to, but well away from the polls.

Thus, regardless of whether Abreu did or did not electioneer as charged, there is an insufficient legal warrant for finding that his activity constitutes grounds for setting aside the election.

#### OBJECTION 6

This objection alleges that the Union coerced employees into voting for the Union by implying falsely that the Union had ways of knowing how employees voted and induced employees to vote for the Union by spreading false rumors of victory and promising benefits upon the Union's victory.

According to Frank Marks, manager of the Kress store involved herein, he was told a short time before the election by Marlene Olivera, an eligible voter, that she had received, in Marks' words, "a threatening letter stating that the Union had ways of finding out how she voted and that if she didn't vote for the Union they would do something to her."

Olivera told a Board agent -- the interview was in Spanish as her English was inadequate for the occasion -- that the only letter she had received from the Union was one having to do with Union benefits, asking her to call a Union telephone number if she wanted to know more about the benefits. It contained no threat of any kind. She no longer has the letter.

<sup>19/</sup> As noted earlier in this report, an Employer official made no effort to bring Abreu's activities to the attention of a Board agent.



Abreu denies ever sending any employee a letter stating or implying that the Union had ways of knowing how an employee would vote and that it would take reprisals against employees who voted against the Union.

The evidence in my opinion, does not sustain the Employer's objection on this point and I hereby overrule it.

No evidence was adduced that the Union, in the language of the objections, "induced employees to vote for the Union by spreading false rumors of victory."

As for the promise by the Union to employees of benefits upon the occurrence of a Union victory, it appears that the Employer was referring to a party that the Union was going to conduct to celebrate its victory. Abreu says he told employees at a Union meeting that if the Union won they would all contribute and have a party. Regardless of whether the Union promised to pay for the entire cost of the party or not, this is hardly the kind of conduct the Board has in mind when it speaks of conduct by a party impairing the "laboratory conditions" under which elections should be run.<sup>20/</sup> Therefore, I find no merit to this objection and I overrule it.

#### OBJECTION 7

This objection alleges coercion of employees because of supervisors actions in support of the Union.

The Employer submitted no evidence to support this objection except its charges made after the hearing and before the election discussed below under Objection 8.

#### OBJECTION 8

This objection restates the position the Employer took after the hearing and issuance of the Decision and Direction of Election that

20/ Hollywood Ceramics, supra, at page 223.

the petition should be dismissed because supervisory personnel had been involved in the original organizing campaign.

The petition in this case was filed on February 22, 1972, and the hearing was held on March 10, 1972. On March 27, 1972 the Decision and Direction of Election issued. On April 4, 1972 the Employer by letter to the undersigned requested an administrative investigation of the sufficiency of Petitioner's showing of interest and asked further that the petition be dismissed on the ground that said showing of interest was tainted by the activities of supervisors, specifically by the activities of supervisors Josie Guzman and Haydee Feliciano. An administrative investigation was made by my direction and the Employer was informed by my letter of April 12, 1972 that the evidence submitted did not establish any special circumstances to justify a departure from the Board's usual procedures requiring that an issue on the sufficiency of a showing of interest be raised at the hearing or within five working days of the close of the hearing. Rather, as pointed out in the Regional Director's letter to the Employer, the investigation established that representatives of the Employer were aware of the substance of the allegations contained in the Employer's letter of April 4, 1972 at least as early as March 17, 1972 and possibly on March 11, 1972, <sup>21/</sup> the day after the hearing, but that no steps had been taken to bring this matter to the attention of the Regional Office until a telephone call of April 3, 1972, followed by the Employer's letter of April 4, 1972.

<sup>21/</sup> Thus, George P. Culbertson, a vice president of the Employer states in an affidavit that he visited the store on March 11, 1972, the day after the hearing closed, and learned from a store employee that the two supervisors in issue had engaged actively in the Union's organizing campaign by signing cards themselves, attending Union meetings, and urging employees to support the Union. He visited the store again on March 17, 1972 for the dual



Under these facts I do not find any special circumstances which would justify departing from the Board's usual procedures relating to the timeliness with which issues on the sufficiency of a showing of interest may be raised by a party.<sup>22/</sup> I accordingly find no merit to Objections 7 and 8.

Moreover, I note that the Employer's attack on the Union's showing of interest relates to conduct by the supervisors which occurred prior to the filing of the petition herein and therefore, under well established Board policy such conduct may not be raised for consideration in objections to an election.<sup>23/</sup>

For all of the foregoing reasons, I find no merit to Objections 7 and 8 and they hereby are overruled.

#### THE CHALLENGES

1. Alfonso Marvaez was challenged by the Board because his name was not on the eligibility list. The Employer and the Union both agree that his vote should not be counted since he is employed as a security man to protect the Employer's property and should not be included in the unit. I find in agreement with the parties that Narvaez is not an eligible employee and sustain the challenge to his ballot.

<sup>21/</sup> (Continued) purpose of conducting his own investigation on what he had learned on March 11, and in order to talk to employees about the Labor Board election. On that day he spoke with Feliciano and was told by her she had attended Union meetings.

<sup>22/</sup> Although no formal determination of the supervisory status of Feliciano and Guzman was made until my Decision of March 27, 1972, the Employer had every reasonable expectation that they would be found to be supervisors as early as March 10, 1972 in view of the fact that the Union agreed with the Employer's petition that they were supervisors and stipulated to this at the hearing.

<sup>23/</sup> The Ideal Electric and Manufacturing Company, 124 NLRB 1275.



2. Carmen Valentin, who was employed as a sales girl, which is an eligible category was challenged by the Board because her name was not on the eligibility list. The Employer submitted affidavits to the effect that Valentin had informed it that she was resigning and further alleges that she did resign at the end of March, at about the time she took her vacation. However, it appears that because of home duties relative to the care of a grandchild, she wished only to work out a part time schedule with the Employer. When the Employer refused to consider her request for part time work, she made arrangements to continue working at the conclusion of her two-week vacation at the end of March.

An examination of Valentin's payroll records shows she was on the payroll without a break at all times material hereto, except for her vacation period. Valentin therefore was an employee at the time of the eligibility cutoff period which was the week ending March 24, 1972, and an employee at the time of the election on May 5, 1972. She is in fact still employed. Therefore her ballot shall be opened and counted.

3. Elvira Gould, a saleslady, was challenged by the Union on the grounds that she was not an employee at the time of the election. It appears that Gould went on sick leave in February, 1972. Her doctor wrote to the Employer twice requesting an extension of sick leave, the last one until June 8, 1972. The Company contends she was on sick leave at all times material hereto. As it appears that Gould was an employee on sick leave, her vote, under customary Board practice, will be counted.

4. and 5. Sonia Morales and Maria Aviles were challenged by the Board as their names were not on the eligibility list. The Employer claims that as they are display department employees, they

are excluded from the unit.<sup>24/</sup> Petitioner maintains that they spend much of their time selling and have a sufficient community of interest with unit employees to warrant their inclusion in the unit.

Both Morales and Aviles have been employed for several years as salesladies. On March 15, 1972 Aviles was told she was to make sales signs. This work has been done by or delegated to an employee by the supervisor of each department and consists of hand printing stock and prices on cards. Aviles had made the signs for her department (bedding) prior to this time. For about a month Aviles spent about half her time making signs only; the other half selling on a relief basis whenever she was needed. On about April 8, Morales was told to do the same work, making signs, and both women were instructed to do the window displays. They work under the direction of the store manager who tells them exactly what merchandise is to be put in the window and where it is to be placed. The employees have no discretion in the selection or method of the display and frequently have to re-do the window as it does not meet the standards of the store manager.

Both employees still spend a substantial part of their time selling merchandise in the store. It appears that even while they are engaged in placing merchandise in the window, one or both may be told to work at a counter on a relief basis or as a replacement leaving the window in a semi-trimmed state. Aviles and Morales spend all day Saturday

<sup>24/</sup> In the Decision and Direction of Election the parties stipulated that display department employees be excluded from the unit on the ground that they do not share a community of interest with unit employees. The record revealed that there were no display department employees at the time and that display work was being performed by supervisory personnel. I accepted the stipulation as it was not inconsistent with the record. Neither the stipulation nor my determination is dispositive of the issues raised herein, for reasons that will be made clear below.



selling; no display work is done that day as the store is too busy with customers. The displays in many of the windows are not changed frequently. One which was trimmed in April remained the same until July and still has not been replaced.

The evidence discloses that Aviles and Morales spend from one third to one half of their time selling merchandise and dealing with customers. Therefore, they are dual function employees, as described above, with a substantial community of interest with other employees in the unit.<sup>25/</sup> It follows that their respective ballots shall be counted.

6. Bernardo Martinez was challenged by the Union on the ground that he is not within the unit and that his duties are primarily those of a managerial and/or security employee. The Employer claims that he is employed as a regular stockman.

Martinez has worked for the Employer for 9 or 10 years. His prior position was with the Employer's Fifth Avenue store where he says he spent two or three days a week working as a security man, patrolling the store, watching employees and customers, watching for shop lifters and other duties of a similar nature. He was transferred to the present store in mid-February, 1972, and claims he does only stockroom work at present. However, it appears that he spends a large part of his time on the selling floor, responding to bells that are rung by sales people seeking assistance, and getting change for cash registers. The investigation revealed that he can sign for refunds to customers which are accepted at the service desk. He also can handle "voids," a method of correcting or changing figures that have been rung into the cash registers by sales people. Only supervisory or managerial employees have this authority. The stock

<sup>25/</sup> Berea Publishing Company, 140 NLRB 516, 519

work done by Martinez is more like the work performed by the assistant managers, who assist when freight shipments are delivered on the sidewalk, than the work done by the regular stockroom employee whose duties are primarily performed in the stockroom on the second floor. The stockroom employee avers that Martinez rarely if ever works with him. Martinez' wages exceed those of many acknowledged supervisors and are considerably more than those of regular stockroom employees.

It would appear that Martinez performs elements of managerial and "guard" functions. However, without determining that he is a managerial employee or a guard within the meaning of the Act, it is clear, on the facts of the investigation that Martinez's interests do not lie substantially with the employees in the unit and I so find. I accordingly sustain the challenge to his ballot.

#### CONCLUSIONS

Inasmuch as the objections are found to be without merit, they hereby are overruled.

Having found that Alfonso Narvaez and Bernardo Martinez are not eligible to vote, the challenges to their ballots shall be sustained and their ballots shall remain unopened and uncounted. The following named individuals: Carmen Valentin, Elvira Gould, Sonia Morales and Maria Aviles, having been found eligible to vote, the challenges to their ballots are overruled and their ballots shall be opened and counted at a place and time subsequently to be designated by me. A revised tally of ballots shall be issued to the parties and based on the results an appropriate order thereafter shall be issued.

Dated: New York, New York  
July 28, 1972

/s/ Ivan C. McLeod  
Regional Director, Second Region  
National Labor Relations Board  
26 Federal Plaza, Suite 3614  
New York, New York 10007



"ATTACHMENT A"  
OUR MOMENT HAS ARRIVED  
ENOUGH IS ENOUGH ! ! !

Publicly we have remained silent with our organization.

But the tricks and lies fabricated by the Company have obligated us to speak out against these insults to our intelligence.

We Spanish speaking people are humble persons but not stupid ones.

This we say in answer to the falsehood circulated by the Company that we would have to pay an initiation fee of \$100, \$200, and \$500 to the Union that wishes to represent us. We don't believe that there exists a Union in the United States that would tax their members these amounts and least of all our Union.

The Company continues to mention these dues and initiation fees which is just another lie.

As we have stated before at our meetings and we now confirm it to you on this hand bill -- the initiation fee to be a member of this Union is \$5.00 and the dues are in proportion to your weekly salary.

Everyone belonging to a Union must pay dues. This is how the organization is maintained. It is the same when you need legal representation to defend you in court. You have to pay.

The Company continues with this propaganda, however, they make no mention of the years they have been making profits at your expense. They do not mention that these profits were realized due to your poor conditions and low wages over all these years.

They also say that eight years ago you had elections and that the Union lost. (This was because they bought out certain workers offering better conditions.) However, after the election passed

the Company gave only a lunch (\$1.00 value) and ten minutes break and none of the other things offered.

This is why we are asking everyone to vote "YES - We Want The Union". We want to liberate you from the Yoke of the Company. This enormous enterprise that says if the Union wins we will close. This also is a lie.

We have been informed by the Honorable Congressman Herman Badillo that there are three projects to be built and have been approved by the Federal State and City Governments for this community and the Company realizes that when they are built it will give further growth and more profits to the Company.

THE TIME OF IGNORANCE IS OVER  
THE OTHER DEPARTMENT STORES HAVE A UNION  
THE FIREMEN, POLICE, TEACHERS  
AND HOSPITALS HAVE UNIONS

We of the 5 cent and 10 cent Stores as they are called do not have to be 5 cent and 10 cent salary persons.

YES - WE WANT THE UNION

DISTRICT 65

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NOTICE OF HEARING ON OBJECTIONS  
AND CHALLENGED BALLOTS

On October 16, 1972, the National Labor Relations Board issued an Order Directing Hearing in this proceeding, a copy of which is attached hereto, for the purpose of resolving issues raised by the Board's challenges to the ballots of Carmen Valentin, Sonia Morales and Maria Aviles, and by the Petitioner's challenge to the ballot of Bernardo Martinez, and certain of the objections filed by the Employer.

YOU HEREBY ARE NOTIFIED that pursuant to Section 102.69(c) of the Board's Rules and Regulations, Series 8, as amended, on the 20th day of November, 1972 at 10:00 a. m. in a Hearing Room of the National Labor Relations Board, Second Region, 26 Federal Plaza, Room 3614, New York, New York, a hearing will be held on the issues stated above, at which time and place the parties will have the right to appear in person, or otherwise, and give testimony.

Dated: New York, New York

October 27, 1972

/s/ Sidney Danielson  
\_\_\_\_\_  
Acting Regional Director  
National Labor Relations Board  
Second Region  
26 Federal Plaza, Room 3614  
New York, New York 10007

## NATIONAL LABOR RELATIONS BOARD

11:00 a. m.

10/16/72

RV:pbr

49380

Region 2 - NLRB  
New York, New York  
Seligman & Seligman  
Att: Madeline Balk, Esq.  
405 Lexington Avenue  
New York, New York 10017

District 65, National Council  
Distributive Workers of America  
Att: Donald Grody  
13 Astor Place  
New York, New York 10003

RE: S. H. KRESS & COMPANY, 2-RC-15824. EMPLOYER'S REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S SUPPLEMENTAL DECISION IS HEREBY GRANTED AS TO OBJECTIONS 5 AND 7 AND AS TO THE CHALLENGES TO THE BALLOTS OF CARMEN VALENTIN, SONIA MORALES, MARIA AVILES AND BERNARDO MARTINEZ. THE BOARD CONCLUDED THAT THE ISSUES RAISED AS TO THESE MATTERS CAN BEST BE RESOLVED BY A HEARING. ACCORDINGLY, THE CASE IS REMANDED TO THE REGIONAL DIRECTOR FOR SUCH HEARING AND FOR FURTHER ACTION IN ACCORD WITH THE BOARD'S RULES AND REGULATIONS. IN ALL OTHER RESPECTS THE REQUEST FOR REVIEW IS DENIED. BY DIRECTION OF THE BOARD:

ROBERT VOLGER

DEPUTY EXECUTIVE SECRETARY

Fanning, Kennedy, Penello  

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Case No. 2-CA-13057

MOTION FOR SUMMARY JUDGMENT

Upon the Charge, the Complaint and Notice of Hearing, and the annexed verified Petition (with Exhibits attached thereto) of Michael S. London, Counsel for the General Counsel, the undersigned hereby moves pursuant to Section 102.24 of the National Labor Relations Board's Rules and Regulations:

1. That prior to, and without the necessity of a hearing, that the Board issue a Decision against Respondent containing findings of fact and conclusions of law, in accordance with the allegations of the Complaint, and an appropriate Order remedying the unfair labor practices so found.

2. That such other, further and different relief be granted as may be appropriate and proper.

Dated: September 19, 1973

/s/ Michael S. London  
Counsel for General Counsel  
National Labor Relations Board  
Region 2  
26 Federal Plaza, Room 3614  
New York, New York 10007

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[Dated 9/19/73]

PETITION IN SUPPORT OF  
MOTION FOR SUMMARY JUDGMENT

Michael S. London, Counsel for the General Counsel, pursuant to Section 102.24 of the Board's Rules and Regulations, Series 8, as amended, herein called the Rules, files a Motion For Summary Judgment and in support thereof states as follows:

1. On March 27, 1972, in Case No. 2-RC-15824, the Regional Director, Region 2 (herein called the Regional Director) of the National Labor Relations Board (herein called the Board) issued a Decision and Direction of Election in the said proceeding (Copy attached hereto and marked Exhibit A) determining that the following described unit is appropriate for the purposes of collective bargaining with respect to certain employees of S. H. Kress and Company at its retail store located at 1915 Third Avenue, New York, New York, (herein called Respondent).

Included: All employees including cashiers, porters, maintenance, stock, food service, sales and office clerical employees.

Excluded: All display employees, professional employees, guards and all supervisors as defined in Section 2(11) of the Act as amended.

2. On or about May 5, 1972, an election by secret ballot was conducted under the supervision of the Regional Director, in the unit described above in paragraph 1 in which the challenges were sufficient to affect the results of the election.

3. On or about May 12, 1972, Respondent filed timely objections. (Copy is attached hereto and marked Exhibit B) to the election described above in paragraph 2 and requested that said election be set aside and a new election ordered.



4. On July 28, 1972, the Regional Director, after an investigation of said election and challenges, issued a Report on Objections, and Challenges, with Recommendations, entitled Supplemental Decision, (Copy attached hereto as Exhibit C), in which he overruled the objections and sustained two challenges and overruled four challenges.

5. (a) Thereafter, Respondent filed a timely Request for Review of the Regional Director's Supplemental Decision. (Copy attached hereto and marked Exhibit D).

(b) On October 16, 1972, the Board granted review on two objections and four of the challenges, and remanded the proceeding to the Regional Director for a hearing.

6. On May 26, 1973, the Hearing Officer issued a Report and Recommendation on Challenged Ballots, (Copy attached hereto as Exhibit E) in which he recommended, inter alia, that the objections be overruled and that the four challenges be overruled and the ballots counted.

7. On June 28, 1973 the Board issued a Decision and Order directing the Regional Director to open and count challenged ballots and issue the appropriate certification. (Copy attached hereto and marked Exhibit F).

8. On July 12, 1973, the Board, adopting the Hearing Officer's findings and recommendation, issued a Certification of Representative to the Union as the exclusive collective bargaining representative of the employees in the unit described above in paragraph 1. (Copy of the Certification of Representative is attached as Exhibit G).

9. On or about July 17, 1973, the Union requested Respondent to recognize and bargain with it as the exclusive collective bargaining representative of Respondent's employees in the unit described

above in paragraph 1, with respect to rates of pay, wages, hours of employment and other terms and conditions of employment.

10. Since on or about July 20, 1973, Respondent has refused to recognize the Union as the exclusive collective bargaining representative of its employees in the unit described above in paragraph 1, and has refused to bargain collectively with the Union as the exclusive collective bargaining representative of its employees and notified the Union, by letter dated July 30, 1973, that it believes that the certification is invalid in that the "NLRB erroneously failed to sustain objections to the election and incorrectly overruled certain challenges and that they cannot accede to the Union's request to bargain until the courts have reviewed the certification." (Copy of the letter dated July 30, 1973 attached hereto and marked Exhibit H).

11. On August 21, 1973 a Complaint and Notice of Hearing issued. (Copy is attached hereto and marked Exhibit I). It alleges in substance that by the conduct set forth in paragraphs one through nine in the Complaint Respondent refused to bargain collectively with the representatives of its employees and interfered with the exercise of rights guaranteed in Section 7 of the Act, and thereby engaged in and is engaging in unfair labor practices within the meaning of Sections 8(a)(1) and (5) of the Act;

12. On or about September 10, 1973, Respondent filed an answer to the Complaint. (Copy is attached hereto and marked Exhibit J). In substance the answer pleaded the following:

(a) Denied the appropriateness of the unit as alleged in paragraph (5) of the Complaint. The unit set forth in the Complaint is the same as the unit which was stipulated to be the appropriate unit by all the parties including Respondent at the representation



hearing on March 10, 1972 in Case No. 2-RC-15824. (Attached hereto is a copy of said stipulation which is marked as Exhibit K). Furthermore, this issue was before the Board at the time of the issuance of its certification, (attached hereto and marked Exhibit G) where the Board adopted as appropriate the unit description as agreed to by the parties. Accordingly, this denial is frivolous and without merit and must be stricken.

(b) Denies the validity of the certification in fact or in law, and further denies that the Union is the exclusive bargaining representative of Respondent's employees.

The issues raised by these denials constitute an attempt to relitigate issues which have been determined previously by the Board in Case No. 2-RC-15824, and accordingly these denials must be stricken. The Board and the courts have consistently held that issues which have been raised and litigated in a prior representation proceeding cannot be relitigated in a subsequent unfair labor practice proceeding. (Pittsburgh Plate Glass v. N. L. R. B., 313 U.S. 146).

13. Additionally, Respondent in paragraphs five, six and seven of its Answer, raised three affirmative defenses. These affirmative defenses refer to the same issues already encompassed by the denials and raise no issues not previously litigated. For the reasons already enumerated above in paragraphs 11 and 12, General Counsel respectfully submits that these defenses be stricken.

WHEREFORE, there being no issues to be determined by a hearing, Counsel for the General Counsel respectfully petitions:

1. That the denials contained in paragraphs 2, 3, and 4 of Respondent's Answer be stricken;
2. That the affirmative defenses raised in paragraphs 5, 6 and 7 of Respondent's Answer be stricken;

3. That a finding be made that all issues deemed to have been litigated and determined in Case No. 2-RC-15824 are binding on the Respondent in this case;

4. That a finding be made that the Respondent has admitted all other material allegations of the Complaint;

5. That a finding be made that the Union requested Respondent to bargain collectively with it as the certified bargaining representative of the employees in the unit set forth in paragraph 1, and that Respondent has refused and continues to refuse to bargain;

6. That a finding be made that Respondent violated Sections 8(a)(1) and (5) of the Act;

7. That a Decision issue containing findings of fact and conclusions of law in accordance with the allegations of the Complaint and that an Order remedying the unfair labor practices issue against Respondent, and ;

8. That such other further and different relief be granted as may be deemed proper and appropriate.

Dated: September 19, 1973

Respectfully submitted,

/s/ Michael S. London  
Counsel for the General Counsel  
National Labor Relations Board  
Region 2  
26 Federal Plaza, Room 3614  
New York, New York 10007



**ORDER TRANSFERRING PROCEEDING TO THE BOARD  
and  
NOTICE TO SHOW CAUSE**

On August 31, 1973, the Acting Regional Director for Region 2 of the National Labor Relations Board issued a Complaint and Notice of Hearing in the above-entitled proceeding, alleging that the Respondent has engaged in and is engaging in certain unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Subsequently, the Respondent filed an answer, admitting in part and denying in part, the allegations of the complaint, submitting affirmative defenses, and requesting that the complaint be dismissed.

Thereafter, on September 24, 1973, the General Counsel, by counsel, filed with the Board in Washington, D.C., a Motion for Summary Judgment and Petition in Support of Motion for Summary Judgment, with exhibits attached. The General Counsel submits, in effect, that the Respondent, in its answer, attempts to relitigate issues which have been determined previously by the Board in the prior representation proceeding, Case 2-RC-14824. He, therefore, moves (1) that prior to, and without the necessity of a hearing, that the Board issue a Decision against Respondent containing findings of fact and conclusions of law, in accordance with the allegations of the Complaint, and an appropriate Order remedying the unfair labor practices so found and (2) that such other, further and different relief be granted as may be appropriate and proper.

The Board having duly considered the matter,

**IT IS HEREBY ORDERED** that the above-entitled proceeding be, and it hereby is, transferred to and continued before the Board in Washington, D.C.

NOTICE IS HEREBY GIVEN that cause be shown, in writing, filed with the Board in Washington, D. C. , on or before October 18, 1973 (with affidavit of service on the parties to this proceeding), why the General Counsel's Motion for Summary Judgment should not be granted.

Dated, Washington, D. C. , October 4, 1973.

By direction of the Board:

/s/ George A. Leet  
Associate Executive Secretary

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NATIONAL LABOR RELATIONS BOARD  
OPERATIONS-MANAGEMENT

12/8/72

Elihu Platt, Asst. Gen. Counsel

49301

SIDNEY DANIELSON, DIRECTOR  
NLRB, REGION 2  
NEW YORK, NEW YORK

REURTEL OF DECEMBER 8, 1972, RE HEARING IN S. H.  
KRESS & CO. , 2-RC-15824, PERMISSION HEREBY GRANTED  
TO HAVE BOARD AGENT ROBERT A. REISINGER TESTIFY IN  
PROCEEDING PROVIDED THAT SUCH TESTIMONY IS LIMITED  
TO THE FOLLOWING ISSUES: (1) WHAT, IF ANYTHING, DID  
REISINGER TELL THE WITNESS IN QUESTION CONCERNING  
WHETHER SUCH WITNESS SHOULD HAVE THE OPPORTUNITY  
TO READ HIS AFFIDAVIT BEFORE SIGNING IT, AND (2)  
WHETHER THE WITNESS ACTUALLY READ THE STATEMENT  
BEFORE SIGNING IT.

PETER G. NASH  
GENERAL COUNSEL

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[Dated 3-26-73]

Case No. 2-RC-15824

HEARING OFFICER'S REPORT AND  
RECOMMENDATIONS ON CHALLENGED BALLOTS

Pursuant to a Decision and Direction of Election issued by the Regional Director for the Second Region on March 2, 1972, an election by secret ballot was held on May 5, 1972 in the above captioned proceeding in a unit consisting of all employees employed by the Employer at its retail store located at 1915 Third Avenue, New York, New York including cashiers, porters, maintenance, stock, food services, sales and office clerical employees but excluding display employees, professional employees, guards and supervisors as defined in the Act.

The Tally of Ballots served upon the parties at the conclusion of the election showed that of approximately 51 eligible voters 54 voted, of whom 25 cast votes for Petitioner 23 voted against Petitioner and 6 were challenged. The Petitioner challenged the votes of 2 employees on the grounds that they were not in the unit, and the Board challenged the votes of 4 employees because their names were not on the eligibility list.

On May 12, 1972, the Employer filed timely objections to the election. Thereafter, the Regional Director for the Second Region caused an investigation to be made of the objections filed and of the 6 challenged ballots, and on July 28, 1972 issued a Supplemental Decision in the above captioned matter, wherein he found no merit to any of the objections, and sustained 2 of the challenges and overruled the remaining 4 challenges.

Thereafter, the Employer filed a Request for Review of the Regional Director's Supplemental Decision, and on October 16 the Board granted review as to objections 5 and 7, and as to the challenges



to the ballots of Carmen Valentin, Sonia Morales, Maria Aviles, and Bernardo Martinez and remanded the case to the Regional Director of the Second Region for hearing. In all other respects the Request for Review was denied.

Thereafter, on October 27, 1972, the Acting Regional Director for the Second Region issued a Notice of Hearing on Objections and Challenged Ballots.

In accordance with said Notice of Hearing a hearing was held before the undersigned duly designated Hearing Officer on December 6, 7, 8, 18, and 26, 1972. All parties were represented by counsel, and were afforded full and complete opportunity to be heard, to examine and cross examine witnesses, to present evidence pertinent to the issues, and to argue orally.

Upon the entire record of this case including my observations of the witnesses, I make the following findings of fact.

#### OBJECTION 5

##### THE EMPLOYER ALLEGES THAT PETITIONER ENGAGED IN ELECTIONEERING IN AND AROUND THE POLLING PLACE DURING THE ELECTION.

The election was held on May 5, 1972, between the hours of 2:30 p.m. - 5 p.m. in a room on the second floor of the Employer's premises. Prior to the election there was a pre-election conference, which was held in a conference room also located on the second floor of the Employer's premises.

The second floor of the Employer's premises is a non selling floor, which houses the ladies' lounge, stockroom, conference room, and other miscellaneous office space. There is a staircase leading from the second floor to the mezzanine floor, which is also a non selling floor and used as an office area. The staircase continues

from the mezzanine landing to the main floor. The main floor and basement of the Employer's premises are the selling areas, which house the various sales counters manned by sales personnel.

The Board Agent in charge of the election informed Petitioner's and Employer's representatives including Mario Abreu, Vice President of Petitioner and George P. Culbertson, Vice President of Sales and Merchandising, and Steven H. Briar, Director of Manpower, of the Employer, that the election area would encompass the area surrounding the conference room, the ladies lounge, the stairway leading from the second floor to the mezzanine area, the mezzanine area, the stairway leading from the mezzanine area to the main floor, and the area around the service or the information desk on the main floor which is adjacent to the stairway. The Board Agent further informed the above representatives that there was to be no electioneering by either party within this designated area, and that neither Employer representatives nor Petitioner representatives should be present in this area during the hours of the election.

The election was held between the scheduled hours 2:30 p. m. to 5 p. m., and was supervised by two Board Agents.

Culbertson and Briar testified that between 2:30 p. m. and 3 p. m., they observed Abreu in and around the information desk area. They further testified that during this period they observed Abreu speak briefly to employees Carmen Valentin, Mary Gomez, and Alfonso Narvaez. They did not overhear these conversations. <sup>1/</sup>

Porfirio Fernandez, a porter, testified on direct examination that sometime between 2:30 to 2:45 p. m., he spoke to Abreu somewhere

<sup>1/</sup> Narvaez is a security officer employed by the Employer. He was challenged by the Board because his name was not on the eligibility list and the Regional Director found, in agreement with the Employer and Petitioner, that Narvaez was not an eligible employee and sustained the challenged to his ballot.



near the service desk area, and that Abreu told him to vote for the Union; that the Union was going to win, and not to let himself get fooled by the Company. Fernandez further testified that Abreu told him sometime between 4:30 and 5 p. m. , that he (Abreu) counted on his vote. The place of where this alleged conversation took place is unspecified.

I do not credit Fernandez testimony. Neither Culbertson nor Briar, Employer officials, observed Abreu talk at any time during the election hours to Fernandez. Further, Culbertson stated unequivocally that he was present on the main floor throughout the election hours, and was in a position where he was always able to observe the election area. I further do not credit Fernandez based on his demeanor. At times his testimony was vague and at other times he was not responsive to questions put to him, especially on cross examination. Further, on cross examination he placed the time of the second alleged conversation somewhere between 3:30 and 3:45 p. m. , which contradicts his direct testimony in this regard.

Both Culbertson and Briar testified that although they observed Abreu speak to several employees they did not speak to Abreu about this, nor did they attempt to contact one of the Board Agents conducting the election to inform him of this activity.

Abreu conceded he was present on the main floor from about 2:30 p. m. to 2:45 p. m. , but testified he was by the public telephone area, which is adjacent to the information desk, from 2:30 to 2:35 p. m. , and thereafter was at the lunch counter which is located on the same isle as the information desk, but separated by the store entrance, until 2:45 p. m. when he left the store.

Abreu denied any conversation with Valentin, Gomez, Narvaez or Fernandez. Carmen Valentin and Mary Gomez testified that they did not have any conversation with Abreu at any time during the election hours.

The leading case in this area is Milchem, Inc., 170 NLRB 362. In Milchem the Board held that sustained conversations with prospective voters waiting to cast their ballot would necessitate a second election. However, the Board noted that isolated or innocuous comments by an employer or union official to a voter would not necessarily void the election; pointing out the old maximum that "the law does not concern itself with trifles." In Harold W. Moore d/b/a Harold W. Moore & Son, 173 NLRB 1258. The employer contended that conversations between petitioners representatives and several employees within 60 feet of the ballot box while the election was in progress was objectionable conduct within the rule of Milchem Inc. supra. In that case the election was conducted in a warehouse building, the actual voting place being 30 feet from the warehouse. The conversations in question took place in a parking lot outside the warehouse entrance at a point some 30 feet away. At this point petitioners representatives spoke with 6 to 8 employees out of 56 who voted, for periods of time between 10 and 15 minutes. The Board did not find this conduct objectionable under the Milchem rule because the prospective voters were not in the polling area or on line waiting to vote.

In view of Milchem Inc. and Harold W. Moore d/b/a Harold W. Moore & Son supra, I find that the facts in the instant case do not warrant setting aside this election.

Without making further credibility resolutions the most that can be established is that Abreu spoke briefly to 2 of 51 eligible employees at a point on the outside fringe of the no electioneering area described by the Board Agent, two floors below the polling place, out of sight of the polling place, and the voters waiting on line to vote. This conduct does not in my opinion fall within the conduct proscribed by the Milchem rule. In this regard, the



conversations were at best isolated in view of the number of voters, and were brief as contrasted with "sustained" and "prolonged" conversations described in Milchem Inc. supra. The maxim, "the law does not concern itself with trifles," is appropriate in this case. c.f. Star Expansion Industries Corporation 170 NLRB 364. I therefore find no basis for setting aside this election based on Abreu's conduct during the election.

#### OBJECTION 7

#### THE EMPLOYER ALLEGES COERCION OF UNIT EMPLOYEES BECAUSE OF SUPERVISOR'S JOSEPHINE GUZMAN AND HAYDEE FELICIANO'S ACTIONS IN SUPPORT OF THE UNION

Josephine Guzman testified that she first became employed by the Employer in 1969 as a sales girl in the Toy Department. On or about May, 1971, she was transferred to the cosmetics, jewelry and toilet goods department, and shortly thereafter became a supervisor of that department. She supervised four girls and was paid at the rate of \$2.20 an hour. Sometime between March 10, 1972 and May 5, she received a 30 cent raise to \$2.50 an hour.

Guzman testified that she attended two union meetings prior to March 10, 1972. The first meeting was held in an employees home, the second was held in a local settlement house at 104 Street, New York City, which has been used at times by the Petitioner for meetings. The meetings were presided over by Mario Abreu. At the second meeting an election for a union committee was held, and Guzman was elected as a committee member along with four other employees. The committee was not informed as to its duties. Guzman testified that at no time during the two meetings she attended, or at any other time, did she distribute, solicit or collect union authorization cards from employees. This is corroborated by Abreu's testimony.

Antonia Garcia, sales girl supervised by Guzman testified that Guzman asked her to sign a union card. However, Garcia could not accurately recall the date of this incident. She further conceded that she had a poor memory as to the incident, and that the incident could have taken place as early as February 17 (five days before the petition was filed).

I do not credit Garcia's testimony based upon her demeanor and for the reasons set forth below. As discussed above, she concedes that she has a poor memory. Further, throughout her testimony she displayed an openly hostile attitude towards Guzman. In addition, she was unresponsive to several material questions put to her on cross examination. Further she gave inconsistent statements concerning material issues; for example, concerning Feliciano's union activities discussed below, Garcia first testified that she saw Feliciano distribute cards to employees under her supervision. Later she admitted she did not see it, but heard about it.

Lydia Matias, sales girl employed by the Employer testified she attended two union meetings. She states that at the first meeting she attended which took place sometime in March, Guzman was present and distributed union cards and leaflets to the employees present, and thereafter collected the signed cards and gave them to Abreu. Matias testified that the second Union meeting took place sometime during the last week in April, 1972.

I do not credit Matias testimony based upon her demeanor and on inconsistent statements. In an affidavit submitted by the Employer, and in an affidavit taken by the Board Agent investigating these objections, Matias placed both Union meetings in March. Further, she states in both affidavits that the booklet described above was distributed by Abreu. Moreover, neither affidavit makes any reference to the distribution of cards, or any literature by Guzman.



Guzman testified that she and the four other members of the union committee attended the Board hearing held at the offices of the Second Region on March 10, 1972 as the employee representatives of Petitioner. They spent the full day at the Board. During the course of this hearing, the Employer and Petitioner stipulated that Haydee Feliciano and Guzman were supervisors within the meaning of the Act, and would be excluded from any unit determined appropriate by the Board.

Guzman and Abreu testified that Guzman and the other members of the Union committee were paid by the Union for the work day missed. Abreu states that this is the Union's standard practice in such cases. Guzman received a check to her order for \$18, which approximately represents her daily rate of pay. March 10, the date of the hearing was a Friday, which was Guzman's day off.

Guzman testified that on March 10 at the conclusion of the Board hearing, Abreu informed her that the Employer and Petitioner had stipulated that she and Feliciano were supervisors, and that she could no longer work for the Union. Abreu's testimony corroborates this. Guzman testified that following this conversation with Abreu, she ceased all activities on behalf of Petitioner and thereafter remained neutral.

Feliciano testified that she had been employed by the Employer since 1963. She was employed as a supervisor as of February, 1972, assigned to supervise the material, domestic, and stationery counters. She supervises eight sales girls, and is paid at an hourly rate at \$2.60 an hour. Feliciano testified that she attended one union meeting several days before March 10, and that she solicited one employee to sign a union card sometime shortly before March 10.

Garcia testified that she saw Feliciano distribute cards to all the girls in her department.

I do not credit Garcia's testimony for the reasons recited above. Moreover, as recited above, Garcia subsequently testified that she did not see Feliciano distribute the cards, but rather heard about it.

Feliciano testified that shortly after the Board hearing on March 10, Abreu told her that she could not attend further union meetings, or work on behalf of the Petitioner because she was a supervisor. Abreu's testimony places this conversation on March 11. Feliciano testified that following her conversation with Abreu, she attended no further Union meetings, nor did she engage in any further activities on behalf of the Petitioner.

Abreu and sales girls Mary Gomez and Soniz Morales testified that neither Guzman or Feliciano attended any union meetings held after March 10.

Guzman and Feliciano testified that there are a total of five department supervisors, including them, throughout the Employers operation. The department supervisors are supervised by several assistant store managers, who are in turn supervised by a store manager. The department supervisors do not have authority to hire, fire, recommend hiring or firing, discipline employees, promote, reward or give employees permission to leave work early. They do however, assign the employees directly under them their daily work.

Garcia testified that on the day Guzman was promoted to the position of supervisor, she told her and the sales girls under her that she had authority to fire employees, send them home early, promote them and order them about. I do not credit Garcia's testimony for the reasons set forth above.

Guzman and Feliciano testified that sometime during the week of March 13, store manager Williams told them that they were



supervisors, and should work for the Employer. Both declined to do so, but stated that they would remain neutral. Employer's President, John L. Brown and Culbertson testified, that they had similar conversations with Guzman and Feliciano sometime during the week of March 20, and received the same response. Additionally, Culbertson testified that during his conversation with Feliciano and Guzman, they admitted that they had at some unspecified time encouraged employees to join the union.

Culbertson testified that the Employer waged an active campaigning to defeat the Petitioner in the upcoming election, and that as a part of the Employer's campaign against the Petitioner, a number of anti-union leaflets were distributed to the employees. The evidence established that the Employer waged an intensive campaign against the Petitioner through the distribution of a large number of varied anti-union leaflets. The leaflets distributed could leave no doubt in the mind of any employee, as to the Employer's position with regard to the Petitioner at the time of the election.

The Board has held that there are 2 considerations that must be considered to determine whether the activities of a supervisor - in support of a petitioning union are sufficient to warrant setting aside an election. The first consideration is whether the conduct of the supervisor has created any misleading implication that the employer favored the union. The second consideration is whether or not the supervisor's activity has had an effect in the continuing relationship between the supervisor and the employees which prevented the employees from exercising their freedom of choice in an election. The Pine Cone Inc. of Monterey 189 NLRB No. 88; Stevenson Equipment Company 174 NLRB No. 865.

In the instant case any implication that the Employer favored the Petitioner as a result of the activities of Guzman and Feliciano

on Petitioner's behalf were dispelled and rebutted by the Employers intensive anti-union campaign in which the Employer distributed a large number of leaflets to employees which left no doubt as to his position.

With respect to the second consideration recited above, I conclude the activities of Guzman and Feliciano in support of the Petitioner were minimal, that they terminated on March 10, almost two months prior to the election (held on May 5), and that they did not prevent the employees from exercising their freedom of choice in the election. In this regard the credible testimony established that Guzman attended 2 Union meetings prior to March 10, and at the second meeting was elected to the Union organizing committee, although she performed no duties on behalf of this committee. In addition, she attended the Board hearing on March 10, held in the offices of the Second Region. Feliciano's activities were even more limited. She attended one Union meeting and solicited 1 employee to sign a Union card. There is no evidence that either Guzman or Feliciano engaged in any activities on behalf of the Petitioner after March 10. Moreover, both Guzman and Feliciano were low level supervisors.

I conclude that the limited activities of Guzman and Feliciano, low level supervisors, followed by a 2 month hiatus did not prevent employees from exercising their freedom of choice in the election. Moreover, assuming arguendo that the testimony of Garcia and Matias were credited I would nevertheless reach the same conclusion in view of the lengthy hiatus described above. I therefore conclude that their limited activities which ended on March 10, as described above, provide no basis for setting aside this election.



### CHALLENGED BALLOTS OF SONIA MORALES AND MARIA AVILES

Sonia Morales and Maria Aviles were challenged by the Board because their names were not on the eligibility list. The Employer claims they are display department employees and are therefore excluded from the unit. <sup>2/</sup>

Aviles testified that she was employed as a sales girl in the domestic counter from 1967 until March 1972. Sometime in March 1972, store manager Williams assigned her to prepare various counter display signs and took her off her regular counter. Thereafter, she prepared display signs for various sales counters and display windows in a small room located near the service desk on the main selling floor. She worked on these display signs approximately 2 days a week. The remainder of the time she was assigned by Williams to work on the sales floor as sales girl behind a variety of sales counters, relieving sales girls during coffee breaks, lunch hours, or helping out at counters that were particularly busy. During this time she performed the same functions that she performed while working behind her regular counter.

Sonia Morales testified that she worked for the company since 1968 as a sales girl in the Toy Department. Sometime during the beginning of April 1972, store manager Marks told her she was going to do some display work.

Aviles and Morales credibly testified that they worked together under the supervision of Grotheer, and thereafter under the supervision of Marks. Neither Morales nor Aviles had any prior experience in display work. The display work they performed during the months of April and May consisted essentially of preparing display

<sup>2/</sup> As set forth above display employees were an excluded classification in the unit found appropriate in the Decision and Direction of Election.

signs for use throughout the store, preparing window displays, and preparing indoor displays. These displays were prepared under the close supervision of Grotheer and Marks.

They prepared display signs using various size cardboard, and lettered and numbered the signs using a magic marker. The signs were price signs and various other display signs, which were placed in the store windows and above indoor displays. Both Aviles and Morales were instructed by Grotheer and Marks exactly what signs to prepare. The signs were generally prepared in the room off the service area described above.

The window display work performed by Aviles and Morales was closely supervised as described above by Marks or Grotheer. Aviles and Morales would be given by Marks or Grotheer a sketch of the display to be erected. They were instructed as to the merchandise that would be required for the display. They would obtain the required merchandise from the various sales counters and return to the window. They were then instructed exactly where to place the merchandise. The display when completed was then scrutinized by Marks or Grotheer. If they did not approve, Aviles and Morales would then be instructed to break it down, and reassemble it in a different manner as determined by Marks or Grotheer. Indoor displays were constructed in the same manner as window displays.

Store manager Marks testified that Aviles and Morales performed much of this work on their own. However, he later conceded that it takes a minimum of 6 months to train an inexperienced employee to operate on his own. Neither Aviles nor Morales had prior experience.

Both Morales and Aviles credibly testified that they performed the display work described above about one half of each working day. The remaining half of their day they performed sales work throughout the store, relieving sales girls on breaks and at lunch, and filling



in at counters that were especially busy. Both Aviles and Morales testified that the work performed by them during this period (April and May 1972) behind the sales counters was the same work they performed behind their regular counters prior to their assignment to display work.

Aviles and Morales further credibly testified that they worked regularly on Saturdays during which time they worked exclusively behind the various sales counters as described above. No display work was performed in the store on Saturday because it is the busiest sales day of the week.

Sales girls Carmen Valentin and Mary Gomez corroborate Aviles and Morales testimony with respect to their time spent behind the sales counter on weekdays and Saturdays.

Marks testified that in March or early April, Morales and Aviles were transferred to the display department, and that thereafter they no longer performed any sales work including Saturdays, pursuant to his instructions.

Based on the credited testimony of Aviles and Morales which is corroborated by Valentin and Gomez, I do not credit Marks assertion that Morales and Aviles performed no counter work after their transfer to the display work.

Howard C. Mcquire, area manager testified that sales employees are sometimes promoted from the sales counter to display department, and that such promotion would be accompanied by a raise in salary. The company records disclose that Morales received a raise on or about April 8 from \$2.03 per hour to \$2.20 per hour. Aviles testified that prior to and at the time, she was assigned to perform display work she was earning \$2.20 an hour and that subsequent to her assignment to display work during the months of March, April and May she received no raise.

Both Aviles and Morales enjoy the same fringe benefits as other sales girls i. e. hospitalization and pension plan.

The credited testimony establishes that Aviles and Morales spend approximately one half of each working week day and all day Saturday performing sales counter work as described above. I therefore conclude that they are dual function employees, share a community of interest with unit employees, are included within the unit, and that their ballots should be opened and counted. Berea Publishing Company, 140 NLRB 516, 519.

#### CHALLENGED BALLOT OF BERNARDO MARTINEZ

Bernardo Martinez was challenged by the Petitioner on the ground that he is a managerial or security employee and therefore not in the unit.

Area Manager, Mcquire and Martinez credibly testified that Martinez has been employed by the Employer for the past 9 years. He has been working in the Employer's Third Avenue store since February 13, 1972. Prior to that he worked at the Employer's Fifth Avenue store and prior to that at other Employer's stores. At the Fifth Avenue store Martinez was employed as a stockman, where his duties included receiving freight, checking freight, and tagging the merchandise behind the sales counters. For a brief period of time during the latter part of 1972, he was assigned to walk the sales floor 2 to 3 days a week looking for shoplifters. During this time he did not wear a uniform. The remainder of his time he performed his usual stockman's duties. Martinez was thereafter transferred to the Employer's Third Avenue store on February 15 to replace a stockman who had recently left. Martinez and Marks credibly testified that during Martinez's employ his position was that of stockman. He worked together with Louis Torez in the stockroom.



Their duties included receiving freight, checking it, tagging it, unpacking the merchandise, bringing it to the sales floor and stacking it behind the counter. Their stockroom duties required that they be present on the sales floor approximately 3 hours a day. At times both Torez and Martinez worked behind the lunch counter serving food to customers and taking out garbage. At other times they swept floors throughout the store.

Martinez is an hourly paid employee at \$2.90 an hour, which is the same rate he received prior to his transfer to the Employer's Third Avenue store. Both Martinez and Torez received their daily instructions from the store manager or one of the assistant store managers.

In addition to Martinez's duties described above he also "answered bells." A bell is rung by a sales girl when she requires change of big bills or in connection with a refund or void. The store manager, the assistant store managers, the five department supervisors, Martinez, Torez and certain selected sales girls customarily answered bells.

Where change of a big bill was required the sales girl would give Martinez or whoever else answered the bell the bill. The bill would then be brought to the cashier, properly changed and the change returned to the sales girl.

A "void" is a slip signed by authorized personnel to confirm that the sales girl made a mistake on the cash register. A "refund" is a slip signed by authorized personnel which permits a customer to return merchandise previously purchased and obtain a cash refund.

Martinez and Marks testified that Martinez had no authority to sign voids or refunds. In such cases he would take the void or refund slip to the manager or assistant managers for other signatures, and return the approved slip to the sales girl for appropriate action.

Sales girls Valentin, Gomez and Malindez testified that Martinez spent considerable time walking in and around the selling floor, and that he answered bells and signed refunds and voids. They testified that in addition to Martinez the only other store personnel with authority to sign refunds and voids are the store manager, assistant managers and department supervisors.

Marks and Martinez credibly testified that Martinez performed no security or guard functions. The security guards are furnished by an independent outside protective agency. They wear uniforms and work the regular store hours. It is conceded that at no time has Martinez worn a security uniform, but rather that his regular attire is slacks and shirt.

Employee Valentin testified that at one time Martinez told her he was a security guard.

The act has not defined "Managerial Employee." The category is Board created, not established by the Act. The concept of a "managerial employees" category appears to have had its origin in Vulcan Corp., 58 NLRB 733, 736. The Board has thereafter generally defined "managerial employees" as those who formulate, determine, and oversee company policy. North Arkansas Electric Cooperative, Inc. 168 NLRB 921 American Federation of Labor etc. 120 NLRB 969, 973. Assuming arguendo that I credit Petitioners witnesses and find that Martinez had authority to change bills and authorize refunds and voids, nevertheless such duties would not bring Martinez within the category of a "managerial employee" as defined above. In this regard the Board held in Eastern Camera & Photo Corp., 140 NLRB 569 that store managers who had authority to make refunds to customers and distribute petty cash were not managerial employees, and included them in a unit of clerical, stock control production and maintenance, and sales employees.



Moreover, Martinez is an hourly paid employee, C. F. Bank of America 174 NLRB 298, 304. While it is true that he earns 40 cents an hour more than Guzman, an admitted supervisor, Guzman as discussed above, is a low level supervisor with limited supervisory authority. The difference in rate of pay can easily be attributed to the number of years employed by Martinez, 9 years, as contrasted with 3 years by Guzman.

There is no evidence that Martinez possesses any indicia of supervisory authority as defined by the Act.<sup>3/</sup>

Similarly, there is no evidence that Martinez performs any security or guard functions.

I therefore conclude that Martinez is a stock employee included within the unit, and that his ballot should be opened and counted.

#### CHALLENGE BALLOT OF CARMEN VALENTIN

Carmen Valentin was challenged by the Board because her name was not on the eligibility list. The Employer alleges that Valentin voluntarily resigned prior to the eligibility cut off date, March 24, 1972. The employer further alleges she was rehired as a new employee on April 15, 1972.

Valentin was employed as a sales girl and worked the stationery counter from April 1969 to March 31, 1972.

Valentin credibly testified that sometime around the end of March, 1972, she informed store manager Williams that her daughter

<sup>3/</sup> Section 2(11) of the Act defines a supervisor as an "individual having authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees or responsibly direct them, or to adjust their grievances or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgement."

was going to work and that she intended to take care of her daughter's baby until she could make arrangements for a replacement baby sitter, but that in the interim she would be available for Saturday work. Williams agreed to this arrangement because she was a good worker. Moreover, as set forth above, Saturday is the busiest day in the store. The employer did not produce Williams to rebutt Valentin's testimony. Valentin further credibly testified that she was scheduled to begin her vacation on April 1 and to return April 15 and thereafter work every Saturday. She filled out a company form sometime in January, 1973 requesting this vacation period in accordance with the Employers standard - procedure requiring employees to submit vacation requests in advance, and obtain approval in order to avoid being short staffed at any given period of time. Although the Employer alleges that Valentin quit on March 31, and did not take a vacation thereafter, it failed to produce Valentin's vacation application claiming they are routinely destroyed at the end of each year.

Valentin credibly testified that on or about March 29, subsequent to her conversation with Williams described above, she informed Marks who had replaced Williams, of her arrangement with Williams and Marks agreed that whatever Williams had agreed to was alright with him.

Marks testified that Valentin told him about her problem and asked if she could work Saturdays, and that he told her he had no room for her as a part time employee, and that she replied in that case that she would leave on March 31.

Peter DeLeon, supervisor at the Employer's Orlando, Florida store, assigned on detail to the Employer's Third Avenue store during the election campaign, testified that Valentin told him she was quitting on March 31 in order to take care of her daughter's baby.



I do not credit Marks or De Leon.

Valentin credibly testified that she began her vacation on April 1, and that sometime during the week of April 10 she returned to the store to say hello to various employees with whom she was socially friendly. She saw Marks at this time and told him that she would return to work on Saturday, April 15. Valentin's vacation ended on April 14. Valentin testified that Marks at this time told her that he could not use her on a part time basis because she was getting \$2.14 an hour, and he could get a new girl to work part time for \$1.85 an hour and therefore unless she could work full time he would not be able to use her. Valentin told Marks she would see what she could do.

Marks conceded he had a conversation with Valentin sometime during the week of April 10, but testified that he told her at this time that she had been replaced.

I do not credit Marks testimony.

Valentin credibly testified that following her conversation with Marks she made arrangements with her daughter-in-law to take care of her daughter's baby and returned to the store a day or so later and again spoke with Marks and informed him that she was ready to work full time when her vacation ended. Marks at this time told her that he had replaced her with another girl and he had no spot for her.

Valentin's replacement was Martha Machuca, regularly employed by the Employer as a sales girl in the candy counter. Sometime during the period April 1 to April 15, Machuca had been transferred to Valentin's spot in the stationery counter. No new employee was hired to take over Machuca's old spot.

Valentin credibly testified that after leaving Marks she returned home and called John L. Brown, President of the Employer, and

told him of her conversations with Marks and that Marks apparently had no job for her. Brown told her that as a result of the union campaign, Marks had been under "strict orders" from him but that he would speak to Marks and Marks would call her up.

Brown did not recall the above conversation with Valentin, but did recall that he had a conversation with her sometime around the middle of April at which time she complained about children abusing her while behind the candy counter.<sup>4/</sup> Brown testified that at the time of his conversation he was unaware of any break in Valentin's employment.

Marks telephoned Valentin following her conversation with Brown and told her she could return to work on April 15, and that she would be working behind the candy counter (Machuca's old counter), rather than the stationery counter. Valentin reported for work on Saturday, April 15, her scheduled date of return from her vacation, and began work behind the candy counter. She has worked behind the candy counter on a full time basis since April 15.

Valentin was not required to fill out any employment forms which are customarily filled out by new employees.

The credited testimony establishes that Valentin received permission sometime during the latter part of March to work on a part time basis every Saturday until she could make arrangements for someone to take care of her daughter's baby, and return to full time work. Valentin began her scheduled vacation on April 1, and returned to work on April 15. As noted above, the Employer was unable to refute Valentin's testimony that she filled out an application in January for her vacation at this time, and that the application was

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<sup>4/</sup> As set forth below, Valentin ultimately returned to work on April 15 behind the candy counter. This would place her conversation with Brown sometime after April 15.



approved. Moreover, Valentin testified that she received 2 weeks pay during her vacation. This also was not refuted by the Employer.

It is conceded that Valentin returned to work on a full time basis on April 15. This would be the day of her scheduled return from vacation. The credited testimony establishes that sometime during Valentin's vacation, she was informed by Marks that he would not permit her to work on a part time basis and that she had been replaced. She thereafter called Brown to complain about this and Brown told her he would speak to Marks, and Marks would call her up. Marks did call her up following her conversation with Brown and told her that she could return to full time counter work, but to a new counter rather than to her old one.

Although the Employer maintains that Valentin quit and was subsequently rehired, she did not fill out an employee application which is the usual practice. Further, it appears that she received the same rate of pay she received prior to the vacation rather than a lower rate received by new employees. In this regard the Employer submitted no evidence to the contrary. Moreover, the Employer did not submit payroll or any other records which might indicate a break in Valentin's employment. Further, the Employer did not hire a new employee to replace Valentin, but merely transferred an employee from her regular counter to Valentin's counter, and placed Valentin in the transferred employees old counter when she returned to work on April 15.

I therefore conclude that Valentin was continuously employed at the time of the eligibility cut off date, the week ending March 24, 1972 through the time of the election on May 5, 1972 and therefore she is included in the unit and her ballot should be opened and counted.

**RECOMMENDATIONS AND CONCLUSIONS:**

In accordance with the foregoing findings of fact including resolutions of credibility, I hereby recommend to the Board that it overrule Employers objections 5 and 7, and that the challenges to the ballots cast by Sonia Morales, Maria Aviles, Bernardo Martinez and Carmen Valentin be overruled and their ballots be opened and counted.

Pursuant to Section 102.69 of the Board's Rules and Regulations and 101.21 of its Statements of Procedures, Series 8, as amended, and the Board's and the Regional Director's Orders, any party, within ten (10) days from the date of issuance of this report, may file with the Board in Washington, D. C. eight (8) copies of exceptions thereto, with supporting briefs. Immediately upon the filing of such exceptions, the party filing same shall serve a copy thereof, together with a copy of any supporting brief, upon the other parties and shall file copies with the Regional Director for the Second Region. A statement of service shall be made to the Board simultaneously with the filing of exceptions. If no exceptions are filed to this report, the Board, upon the expiration of the period for filing such exceptions, may decide the matter forthwith upon the record or may make other disposition of the case.

Dated at Brooklyn, New York this 21st day of March, 1973.

/s/ Howard A. Edelman  
Hearing Officer  
National Labor Relations Board  
16 Court Street  
Brooklyn, New York 11241

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[Dated 6/28/73]

[New York, New York]

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**DECISION AND ORDER DIRECTING REGIONAL DIRECTOR TO  
OPEN AND COUNT CHALLENGED BALLOTS AND  
ISSUE APPROPRIATE CERTIFICATION**

Pursuant to a Decision and Direction of Election, an election by secret ballot was conducted in the above-entitled proceeding on May 5, 1972, under the direction and supervision of the Regional Director for Region 2 in the unit described below. Upon the conclusion of the election a tally of ballots was furnished the parties. The tally of ballots showed that of approximately 51 eligible voters, 54 cast ballots, 25 of which were cast for the Petitioner, 23 were cast against the Petitioner and 6 were challenged. The challenged ballots were sufficient in number to affect the results of the election.

Thereafter, the Employer filed timely objections to conduct affecting the results of the election. On July 28, 1972, after completing an investigation of the challenged ballots and the objections, the Regional Director issued and served on the parties, his Supplemental Decision, wherein he found no merit to any of the objections, and sustained 2 of the challenges and overruled the remaining four challenges.

Thereafter, the Employer filed a Request for Review of the Regional Director's Supplemental Decision, and on October 16, 1972, the Board granted review as to objections 5 and 7, and as to the challenges to the ballots of Carmen Valentin, Soniz Morales, Maria Aviles, and Bernardo Martinez, and remanded the proceeding to the Regional Director for Region 2 for hearing. In all other respects the Request for Review was denied.

Pursuant to Notice and in accordance with the aforesaid Order, a hearing was held on December 6, 7, 8, 18, and 26, 1972, at New

York, New York, before Hearing Officer Howard A. Edelman, the Hearing Officer duly designated to conduct the hearing on the objections and challenges. All parties were represented by counsel and participated in the hearing. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing upon the issues.

On May 26, 1973, the Hearing Officer issued his Report and Recommendations on Challenged Ballots in which he recommended that Employer's objections 5 and 7 be overruled, and that the challenges to the ballots cast by Soniz Morales, Maria Aviles, Bernardo Martinez and Carmen Valentin be overruled and their ballots be opened and counted. Thereafter, the Employer filed timely exceptions to the Hearing Officer's Report and Recommendations on Challenged Ballots.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the Board has delegated its powers in connection with this case to a three-member panel.

Upon the entire record in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
2. The labor organization involved claims to represent certain employees of the Employer.
3. A question affecting commerce exists concerning the representation of employees within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
4. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.



All employees employed by the Employer at its retail store located at 1915 Third Avenue, New York, New York, including cashiers, porters, maintenance, stock, food services, sales professional employees, guards and supervisors as defined in the Act.

5. The Board has considered the Hearing Officer's Report and Recommendations on Challenged Ballots and the Employer's exceptions thereto, and hereby adopts the Hearing Officer's findings and recommendations. <sup>1/</sup>

Accordingly, inasmuch as the 4 ballots as to which the Hearing Officer recommended that challenges be overruled are sufficient in number to affect the results of the election, we shall order that they be opened and counted and a revised tally of ballots be issued.

#### ORDER

IT IS HEREBY DIRECTED that the Regional Director for Region 2 shall, pursuant to the Board's Rules and Regulations, within 10 days from the date of this direction, open and count the ballots of Sonia Morales, Maria Aviles, Bernardo Martinez and Carmen Valentin, and thereafter prepare and cause to be served on the parties a revised tally of ballots. Thereafter, the Regional Director shall issue the appropriate certification.

Dated, Washington, D. C., June 28, 1973.

/s/ John H. Fanning  
Member

/s/ Ralph E. Kennedy  
Member

/s/ John A. Penello  
Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

1/ The Employer's exceptions in our opinion, raise no material or substantial issue of fact or law which would warrant reversal of the Hearing Officer's findings and recommendations.

[Dated 3/26/74]

[D--8413  
New York, N. Y.]

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Case 2-CA-13057

## DECISION AND ORDER

Upon a charge filed on August 1, 1973, by District 65, National Council Distributive Workers of America, herein called the Union, and duly served on S. H. Kress & Company, herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Acting Regional Director for Region 2, issued a complaint and notice of hearing on August 31, 1973, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before an Administrative Law Judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on July 12, 1973, following a Board election in Case 2-RC-15824 the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the stipulated unit found appropriate; <sup>1/</sup> and that, commencing on or about July 20, 1973, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively

<sup>1/</sup> Official notice is taken of the record in the representation proceeding, Case 2-RC-15824, as the term "record" is defined in Secs. 102.68 and 102.69(f) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938, enfd. 388 F.2d 683 (C.A. 4, 1968); *Golden Age Beverage Co.*, 167 NLRB 151, enfd. 415 F.2d 26 (C.A. 5, 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C. Va., 1967); *Follett Corp.*, 164 NLRB 378, enfd. 397 F.2d 91 (C.A. 7, 1968); Sec. 9(d) of the NLRA.



with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On September 10, 1973, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint, submitting affirmative defenses, and praying that the complaint be dismissed.

On September 24, 1973, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment and Petition in Support of Motion for Summary Judgment, with exhibits attached, requesting that the Board take official notice of the record in Case 2-RC-15824 and that the pleadings herein be considered together therewith, alleging that the Respondent's answer to the complaint raised no issues which were not raised and decided in the prior representation proceedings, and praying the Board to grant the Motion for Summary Judgment. Subsequently, on October 4, 1973, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Thereafter, Respondent filed a response to Notice To Show Cause and the General Counsel filed a response thereto.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

#### Ruling on the Motion for Summary Judgment

In its response to the Notice To Show Cause, as in the affirmative defenses alleged in its answer to the complaint, the Respondent

attacks the Regional Director's and the Board's several rulings at the various stages of the representation proceeding relating to the appropriateness of the unit, its objections to the election, and the resulting certification. Thus, the Respondent admits that the "central issue in the instant proceeding is whether the Certification of Representative issued to [the Union], in Case No. 2-RC-15824, is invalid because the Regional Director and the Board erroneously overruled Respondent's objections to the election and erroneously overruled Respondent's challenges to the ballots of Maria Aviles, Sonia Morales, and Carmen Valentin." The Respondent further admits that by denying the appropriateness of the unit alleged in the complaint, it is seeking to obtain a review of the Board's determinations on the challenges, and that, in any case, the denials and defenses set forth in the Respondent's answer are required in order to preserve Respondent's right to judicial review of the Board's action in the representation proceeding.<sup>2/</sup>

Upon the record before us, including the record in Case 2-RC-15824, we find no merit in the Respondent's position. On March 10, 1972, during the course of the representation hearing in Case 2-RC-15824, all the parties, including the Respondent, stipulated to the appropriate unit as alleged in the complaint. Subsequently, on May 5, 1972, pursuant to a Decision and Direction of Election, an election was conducted in the stipulated appropriate unit, and upon

<sup>2/</sup> By letter dated July 20, 1973, the Respondent notified the Union that it believed that the Certification of Representative was invalid in that the Board erroneously failed to sustain the Respondent's objections to the election and incorrectly overruled certain challenges, and that Respondent could not accede to the request to bargain until the courts have reviewed the certification.



conclusion of the election the parties were served with a tally of ballots which reflected that, of approximately 51 eligible voters, 54 cast ballots, 25 of which were cast for the Union, 23 were cast against the Union, and 6 were challenged. The challenged ballots were sufficient in number to affect the results of the election. Thereafter, the Respondent filed timely objections to conduct affecting the results of the election. On July 28, 1972, after investigation of the challenged ballots and the objections, the Regional Director issued his Supplemental Decision, in which he found no merit to any of the objections, sustained two of the challenges, and overruled the remaining four challenges. The Respondent, thereafter, filed a request for review of the Regional Director's Supplemental Decision. On October 16, 1972, the Board granted review as to Objections 5 and 7 and as to the four challenged ballots, which included those of Carmen Valentin, Sonia Morales, and Maria Aviles, and remanded the proceeding to the Regional Director for hearing. In all other respects the request for review was denied. Thereafter, the Respondent filed a motion requesting reconsideration of the Board's October 16 Order which the Board, on October 27, 1972, denied as lacking in merit.

A hearing was held on December 6, 7, 8, 18, and 26, 1972, on the objections and challenges. All parties were represented by counsel and participated in the hearing. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing upon the issues. On May 26, 1973, the Hearing Officer issued his Report and Recommendations on Challenged Ballots wherein he recommended that the Respondent's Objections 5 and 7 be overruled, that the four challenges be overruled, and that they be opened and counted. The Respondent, thereafter, filed timely exceptions to the Hearing Officer's Report and Recommendations on Challenged Ballots.

On June 28, 1973, the Board issued its Decision and Order Directing Regional Director To Open and Count Challenged Ballots and Issue Appropriate Certification in which, after having considered the entire record in this case, including the Hearing Officer's Report and Recommendations on Challenged Ballots and the Respondent's exceptions thereto, the Board adopted the Hearing Officer's findings and recommendations. The Board further found that Respondent's exceptions raised no material or substantial issue of fact or law which would warrant reversal of the Hearing Officer's findings and recommendations. Accordingly, inasmuch as the four ballots which the Hearing Officer recommended that challenges be overruled were sufficient in number to affect the results of the election, the Board ordered that they be opened and counted; that a revised tally of ballots be issued; and that the Regional Director issue the appropriate certification. The revised tally of ballots reflected that a majority of the valid votes had been cast in favor of the Union and, accordingly, the Union was certified as the collective-bargaining representative of the employees described in the complaint.

Clearly, by its answer to the complaint, and more specifically by its denials, in whole or in part, of the allegations of the complaint, the affirmative defenses alleged in its answer, <sup>3/</sup> and the arguments propounded in its response to the Notice To Show Cause,

<sup>3/</sup> As an affirmative defense in its answer to the complaint, the Respondent avers that it cannot be charged with the commission of any unfair labor practice, and that no unfair labor practice can be found, since at no time has the Board ever reviewed the record of the representation proceeding, Case 2-RC-15824. However, as indicated above, the Board in its Decision of June 28, 1973, considered the entire record in Case 2-RC-15824, and we find no ground for disturbing the findings and conclusions contained therein.



the Respondent is attempting to relitigate the same issues which it raised in the representation proceeding, Case 2-RC-15824.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.<sup>4/</sup>

All issues raised by the Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and the Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We, therefore, find that the Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. We shall, accordingly, grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

#### Findings of Fact

##### I. The Business of the Respondent

The Respondent is, and has been at all times material herein, a corporation duly organized under, and existing by virtue of, the laws of the State of Tennessee. At all times material herein, Respondent has maintained a retail store located at 1915 Third Avenue, in the city of New York, and State of New York, and several other retail stores, in the city of New York, as well as retail stores

<sup>4/</sup> See Pittsburgh Plate Glass Co. v. N. L. R. B., 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

located throughout the country, where it is, and has been at all times material herein, engaged in the sales of general merchandise. During the past year, which period is representative of its annual operations generally, Respondent, in the course and conduct of its business operations sold and distributed merchandise in excess of \$500,000, of which products valued in excess of \$50,000 were purchased directly from suppliers located outside of the State of New York.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

## II. The Labor Organization Involved

District 65, National Council Distributive Workers of America, is a labor organization within the meaning of Section 2(5) of the Act.

## III. The Unfair Labor Practices

### A. The Representation Proceeding

#### 1. The unit

The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

All employees employed by the Respondent at its retail store located at 1915 Third Avenue, New York, New York, including cashiers, porters, maintenance, stock, food service, sales and office clerical employees, but excluding all display employees, professional employees, guards and supervisors as defined in the Act.



## 2. The certification

On May 5, 1972, a majority of the employees of Respondent in said stipulated unit, in a secret ballot election conducted under the supervision of the Regional Director for Region 2, designated the Union as their representative for the purpose of collective bargaining with the Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on July 12, 1973, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

### B. The Request To Bargain and Respondent's Refusal

Commencing on or about July 17, 1973, and at all times thereafter, the Union has requested the Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about July 20, 1973, and continuing at all times thereafter to date, the Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that the Respondent has, since July 20, 1973, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

## IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I,

above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

#### V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See Mar-Jac Poultry Company, Inc., 136 NLRB 785; Commerce Company d/b/a Lamar Hotel, 140 NLRB 226, 229, enfd. 328 F.2d 600 (C.A. 5), cert. denied 379 U.S. 817; Burnett Construction Company, 149 NLRB 1419, 1421, enfd. 350 F.2d 57 (C.A. 10).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

#### Conclusions of Law

1. S. H. Kress & Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. District 65, National Council Distributive Workers of America is a labor organization within the meaning of Section 2(5) of the Act.



3. All employees employed by the Respondent at its retail store located at 1915 Third Avenue, New York, New York, including cashiers, porters, maintenance, stock, food service, sales and office clerical employees, but excluding all display employees, professional employees, guards and supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since July 12, 1973, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about July 20, 1973, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

#### ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders

that Respondent, S. H. Kress & Company, New York, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with District 65, National Council Distributive Workers of America, as the exclusive bargaining representative of its employees in the following appropriate unit:

All employees employed by the Respondent at its retail store located at 1915 Third Avenue, New York, New York, including cashiers, porters, maintenance, stock, food service, sales and office clerical employees, but excluding all display employees, professional employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its retail store located at 1915 Third Avenue, New York City, copies of the attached notice marked "Appendix." <sup>5/</sup>

<sup>5/</sup> In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading



Copies of said notice, on forms provided by the Regional Director for Region 2, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 2, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D. C. March 26, 1974.

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John H. Fanning, Member

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Ralph E. Kennedy, Member

\_\_\_\_\_  
John A. Penello, Member

(SEAL)

NATIONAL LABOR RELATIONS BOARD

5/ (Continued) "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX  
NOTICE TO EMPLOYEES

Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with District 65, National Council Distributive Workers of America, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All employees employed by the Respondent at its retail store located at 1915 Third Avenue, New York, New York, including cashiers, porters, maintenance, stock, food service, sales and office clerical employees, but excluding all display employees, professional employees, guards and supervisors as defined in the Act.

S. H. KRESS & COMPANY  
(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)



This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 36th Floor, Federal Building, 26 Federal Plaza, New York, New York 10007, Telephone 212--264-0306.

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Seligman & Seligman  
Attorneys

May 11, 1972

Mr. Ivan C. McLeod  
Regional Director  
National Labor Relations Board  
Region 2  
Federal Building - Room 3614  
26 Federal Plaza  
New York, New York 10007

Re: S. H. Kress & Company  
Case No. 2-RC-15824

Dear Mr. McLeod:

Pursuant to Section 102.69 of the Board's Rules and Regulations, S. H. Kress & Company, the Employer, hereby files these objections to the conduct of the election and to the conduct affecting the results of the election held on May 5, 1972.

1. The union engaged in deliberate trickery and misrepresentations of material facts such as, among other other things, the amount of union dues and other charges, wage increases, benefits, pay rates and pay plans in union facilities, union benefits and services, and other false and misleading statements in literature, in verbal statements and other campaign media, and reiterated such misrepresentations at a time and in such a manner that they could not be answered; and coerced and intimidated the employees and so lowered campaign standards that the uninhibited desires of the employees could not be determined.
2. For the purpose of improperly and unlawfully influencing the outcome of the election, the union, its agents, representatives and others, circulated false and misleading information about the Employer and other material facts, and injected extraneous issues designed to instill racial discrimination and hatred into its organizing campaign.



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3. The union, its agents, representatives and others, coerced employees by threats of physical injury, economic harm and other types of threats and harassment, including the threat of outside group force, and by offering and giving unlawful inducements, benefits and other things of value to force or induce employees to vote for the union.
4. The union, its agents, representatives and others, engaged in activity designed to convince the employees that the Federal and local governments, its agents and representatives, favored the union and desired the employees to vote for the union.
5. The union, its agents, representatives and others, engaged in electioneering and other interference in and around the polling places during the voting.
6. The union, its agents, representatives and others, coerced the employees into voting for the union by falsely implying that the union had ways of knowing how the employees voted and induced employees to vote for the union by spreading false rumors of victory in advance of the election returns and promising employees other benefits upon the occurrence of a union victory.
7. The employees could not make free and uninhibited choices in this election because supervisors' actions in support of the union was such as to coerce the employees.
8. The election was improperly conducted because of the participation, instigation and sponsorship of the union by supervisors. The failure of the Board to dismiss this proceeding and to continue to process this case and hold an election in the face of the supervisory participation on behalf of the union was improper and contrary to reported Board precedent.

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By this and other proscribed conduct, both individually and collectively as a course of conduct, the election was interfered with and the employees were prevented from making a free and untrammelled choice in the election, and said election should be set aside.

Respectfully submitted

SELIGMAN & SELIGMAN  
Attorneys for the Employer

/s/ Madeline Balk

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EMPLOYER'S REQUEST FOR REVIEW OF THE REGIONAL  
DIRECTOR'S SUPPLEMENTAL DECISION DATED  
JULY 28, 1972

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Pursuant to Sections 102.69 and 102.67 of the Board's Rules and Regulations, as amended, S. H. Kress & Company, the Employer herein, respectfully requests review of the Supplemental Decision issued in this proceeding by the Regional Director for the Second Region on July 28, 1972.

In the Supplemental Decision, the Regional Director, without a hearing on substantial and material issues of fact, discredited the Employer's witnesses, made certain findings of fact based on unsupported Union claims which are directly contrary to the facts on the record, failed to resolve major issues of fact raised by the investigation, failed to make a full and complete investigation on the issues involved, and failed to consider evidence proffered by the Employer. Moreover, in said Supplemental Decision, the Regional Director departed from existing Board precedent in reaching certain conclusions of law, erred in the application of Board policies and failed to rely on existing precedent in his Decision.

Accordingly, since the Supplemental Decision:

1. Raises substantial questions of law and policy because of the absence of or departure from officially reported Board precedent,
2. Is clearly erroneous on the record on substantial factual issues and such errors prejudicially affect the rights of the Employer,
3. Fails to direct a hearing on substantial and material factual issues and such failure has resulted in prejudicial error, and

4. Demonstrates that there exist compelling reasons for reconsideration of an important Board policy, the Employer respectfully requests that the Board review and set aside the Regional Director's Supplemental Decision and vacate the challenges to the ballots of Elvira Gould and Bernardo Martinez, uphold the challenges to the ballots of Sonia Morales, Maria Aviles and Carmen Valentin and, after a revised tally of ballots has been served, if it is found that the majority of the ballots have been cast for the Union, direct that a new election be conducted or, in the alternative, direct that a hearing be held before an impartial Trial Examiner, so that the evidence previously overlooked by the Regional Director may be adequately considered, and to resolve the substantial and material factual issues involved.

#### A. THE CHALLENGES

##### 1. Bernardo Martinez

While the challenge to the ballot of Bernardo Martinez is treated at the end of the Regional Director's Supplemental Decision, we have reversed the order because the determinations with respect to Martinez are so clearly contrary to the law and the facts, and so patently biased against the Employer, that it reflects on the Regional Director's disposition of the other challenges.

In the case of Martinez, the Regional Director made unilateral determinations of material facts directly contrary to the facts on the record and/or based his findings on alleged information never brought to the attention of the Employer, and which a full and fair investigation would have revealed was inaccurate or untrue.

The Regional Director incorrectly states that the Union challenged Martinez' vote on the grounds that his duties are primarily those of a managerial and/or security employee (Supp. Dec. p. 19).



On the contrary, the only basis given by the Union for challenging Martinez' vote was to claim that he was a guard. This claim was brought to the Employer's attention two days before the election by a Board agent who telephoned the Employer's attorney, advising that the Union claimed that Martinez was a guard performing the same duties as Alfonso Narvaez. \*

According to the Board agent, it was the Union's position that if Martinez was permitted to vote, the Union wanted Narvaez to vote. The Employer explained that Martinez was not a guard but was employed as an experienced stockman and was eligible to vote, while Narvaez was a guard and ineligible.

Again, during the pre-election conference immediately preceding the election, as is shown in the affidavit of Frank Marks annexed hereto (Employer's Exhibit 1), the Union again reiterated its claim that Martinez was a guard. No other reason was given to the Employer for challenging his vote, nor was any other reason given at any time throughout the entire investigation prior to the issuance of the Supplemental Decision.

We submit that the Employer was never apprised that the Regional Director was considering excluding Martinez from the unit on the grounds that he was a managerial employee and, as can be seen, he was not a managerial employee and his work and interests were closely allied to those of the employees included in the unit.

\* The Employer had not included Alfonso Narvaez on the eligibility list because he was clearly a guard and, in addition, was not even employed on the eligibility date. Nevertheless, Narvaez came in to vote and his vote was challenged by the Board agent because he was not on the list. During the course of the investigation on the challenges, the Union withdrew its attempt to have Narvaez' vote counted.

The evidence presented by the Employer to the Regional Director shows that Martinez was transferred to the Third Avenue store because the store needed an experienced stockman. His duties involved the receiving of freight deliveries and all necessary paper work involved in matching the actual merchandise received with the invoices for such merchandise. He was also responsible for the orderly arrangement of incoming stock by proper departments and for maintaining the stockroom in a neat and orderly fashion, so stock could be moved to the proper departments. He also ticketed the merchandise and carried the merchandise from the stockroom to the sales floor. He arranged the merchandise on the counters on the sales floor. He performed general maintenance work throughout the store and in the food department. He had no authority or responsibility to enforce against employees or other persons rules to protect the property of the Employer or to protect the safety of the Employer's premises. Yet, the Regional Director does not even mention this. Instead, the Regional Director finds that Martinez performs elements of "managerial" and "guard" functions because he spends a large part of his time on the selling floor responding to bells that are rung by sales people seeking assistance and getting change for cash registers, and he can sign for refunds and can handle "voids". Without checking with the Employer, the Regional Director makes the incorrect finding that only supervisory or managerial employees have this authority (Supp. Dec. p. 19).

Since the Regional Director never brought to the Employer's attention the allegations that only supervisory or managerial employees have the authority to perform some of the duties performed by Martinez, the Employer has attached hereto an additional affidavit of Frank Marks, the store manager, setting forth the correct facts. Contrary to the Regional Director, Mr. Marks points out that with



respect to the function of responding to bells that are rung by sales people seeking assistance and getting change for cash registers, the following employees who voted in the election without challenge perform these functions more frequently than Martinez: Yolande Zambianchi, Susie Diaz, Martha Machuca, Mary Gomez, Gloria Velasquez and Lydia Matias. As to signing for refunds, Delia Melendez and Gloria Velasquez, employees in the unit who voted without challenge, and, currently, Elva Otero, another non-supervisory employee, do this. Melendez and Velasquez, who performed this function at the time of the election, and now Elva Otero, sign for refunds without prior approval by any supervisor. On the other hand, Martinez had to get the prior approval of the store manager or assistant manager before he could sign for refunds. Mr. Marks' affidavit further shows that the Regional Director's claim that Martinez could handle "voids" was incorrect. The Regional Director's further statement that Martinez' wages exceed those of regular stockroom employees is also inaccurate. As Mr. Marks' affidavit shows, Martinez' wages were 40 cents an hour below those of the former experienced stockman who voted in the prior election held at this store, without challenge (Marks' Aff., Employer's Exh. 1).

Not only are the findings on which the Regional Director bases his determination that Martinez performs elements of "managerial" and "guard" functions incorrect, but even if these findings were accepted arguendo, they would still be insufficient to establish that Martinez was either a managerial or guard employee or that his interests do not lie substantially with the employees in the unit. \*

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\* The Regional Director for some unexplained reason makes reference to some duties Martinez performed when he was

The Board has defined managerial employees as those who formulate, determine and effectuate an Employer's policies.

American Federation of Labor, etc., 120 NLRB 969, 973. Such duties as responding to sales clerks' bells and getting change for cash registers, signing for refunds or even handling "voids" clearly do not come within this definition of managerial duties. In fact, the Board has specifically found that employees performing these functions are not managerial, and has ruled them eligible to vote in regular store-wide units similar to the case at bar.

Thus, in Eastern Camera and Photo Corp., 140 NLRB 569, 570-571, the Board ruled that store managers who can make refunds

\* employed in another store, at a period prior to the filing of the petition in this case (Supp. Dec. p. 19). Since this involved another job at another location at a time not involved in this proceeding, it is clearly irrelevant to this proceeding since it is only Martinez' job duties during the relevant dates preceding and at the time of the election at the store involved which would determine whether or not he was an eligible voter. The Regional Director refers to the fact that prior to Martinez' transfer to the Third Avenue store, Martinez spent two or three days working as a security man at another store. The security work referred to involved watching the store for shoplifters. We can only assume this reference was injected to color the picture, since the record shows that Martinez was transferred out of this position by mid-February 1972 (Supp. Dec. 1. 19), before the petition was even filed in this case, and it is undisputed that Martinez performed no such duties at the Third Avenue Store. However, since the picture has already been colored by this irrelevant reference, Martinez' further statement that he performed these duties for a period of only several months during his 9 to 10 years employment with the Company, and that his principal job was that of stockman, is annexed hereto (Employer's Exh. 2).



to customers and distribute petty cash were not managerial employees, and included them in the unit of all office clerical, stock control, production, maintenance and sales employees sought by the Union.

In F. W. Woolworth, 188 NLRB No. 119, a sales floor supervisor whose duties included handling lay-aways, making refunds, approving checks paid by customers for their purchases, keeping the keys to the cash drawer and making change at the request of the salesgirls, was held eligible to vote. Again, in Florsheim Retail Boot Shop, 80 NLRB 1312, the store managers were held eligible to vote even though their job duties included handling the customers' complaints, having charge of the stock book and store records, writing stock and factory production orders, and making bank deposits. It is apparent that the duties on which the Regional Director relies for his holding that Martinez was a managerial employee are far more limited than the duties of the employees who were ruled eligible to vote in the cited cases.

Since it is clearly evident that none of the duties described by the Regional Director involved any elements of guard functions, no further discussion is necessary.

The Regional Director's final conclusion that Martinez' interests do not lie substantially with the employees in the unit (Supp. Dec. p. 20) is similarly unwarranted by the record. As Mr. Marks' affidavit shows, Martinez is paid an hourly rate, he receives overtime, he gets the same fringe benefits as all other employees in the unit, he works the same hours under the same supervision and performs his work on the selling floor or stock areas in close proximity with other unit employees. The duties which the Regional Director points to as the basis for excluding Martinez actually demonstrate that Martinez has a close community of interests with the other unit employees. The

work of responding to bells rung by the sales people seeking assistance, getting change for cash registers and signing for refunds, which obviously are performed directly on the selling floor, are clearly a direct extension of the sales duties of selling employees who are included in the unit. The Regional Director himself points out that Martinez spends a large part of his time on the selling floor (Supp. Dec. p. 19).

Thus, even were we to accept the Regional Director's description of the duties performed by Martinez, it is clear that they are neither managerial nor guard duties and his interests are closely allied with those of the other employees in the unit. Accordingly, the challenge to his ballot should be overruled and his vote should be opened and counted.

## 2. Carmen Valentin

Once again, the Regional Director's Recital of the facts ignores the evidence submitted by the Employer. The evidence demonstrates that Valentin advised a supervisor that she was quitting her job. The reason she gave was that her daughter was returning to work as a secretary and would make more money than she did. For that reason, Mrs. Valentin advised the supervisor that it would be more practicable for her to stay home and take care of her daughter's baby. Before the cut-off date for eligibility, Mrs. Valentin gave the store manager two weeks notice of her resignation and left her employment at the end of the notice period.

The Regional Director did not bring to the Employer's attention the contention that Valentin was on a paid vacation after she left, rather than being a voluntary quit as the facts demonstrate. Since the Regional Director apparently relies on the fact that Mrs. Valentin received vacation pay, we are annexing hereto affidavit of the Company's



Director of Manpower (Employer's Exhibit 3), showing that it is the Company's established practice when an employee who has been employed for six months as of February 1 resigns and such resignation takes effect after February 1, to pay vacation pay at the time of separation.

We respectfully submit that under these circumstances Carmen Valentin must be found to have quit her employment prior to the election date and, therefore, the challenge to her ballot should be upheld.

### 3. Sonia Morales and Maria Aviles

The Regional Director, in making his findings concerning the duties of these two display department employees, completely ignores the evidence submitted by the Employer.

In the Supplemental Decision (p. 18), the Regional Director attempts to make it appear that on March 15, 1972 Maria Aviles was summarily told she was to make sales signs. In actuality, the evidence submitted to the Regional Director reveals that the prior employee in the display department had left the Company's employ in the latter part of December. Subsequently, since Maria Aviles had requested the opportunity to do display work and an additional worker was needed in display, she was transferred to the display department on March 15, 1972. When the work load in the display department increased further, Sonia Morales also transferred to the display department on April 8, 1972.

The work in the display department consists of more than just making signs, as the Supplemental Decision attempts to make it appear, and, contrary to the statements in the Supplemental Decision, after Morales and Aviles had transferred to the Display Department, they did not spend any time selling merchandise and dealing with customers in the store.

Since the Regional Director never apprised the Employer of these contentions, we have appended hereto an additional statement by Frank Marks showing that during his tenure as store manager, Aviles and Morales did not spend any time selling after their transfer to the display department (Frank Marks' Affidavit, Employer Exh. 1). Since Marks was the store manager from March 29 to August 27, 1972, this establishes that Avilez and Moralez did not perform selling work during the critical period including the election date and the weeks immediately preceding it. It further establishes that during the critical period and, in fact, up to last week, the work performed by Aviles and Morales was not a dual function job.

Marks' affidavit also shows, contrary to the Regional Director, that work in the display department involves more than making signs. In his affidavit, Marks points out that during the times Morales and Aviles are not trimming windows, they do interior displays, dress mannequins and revamp counters for display purposes, as well as make signs. Marks' affidavit also demonstrates that the Regional Director's finding that these employees have no discretion in the selection and method of display is incorrect. Marks specifically points out that after training these employees have discretion in merchandising, planning and arranging the displays. (Frank Marks' Affidavit, Employer's Exh. 1).

Berea Publishing Company, cited in the Supplemental Decision (Fn. 25, p. 19) is inapposite. That decision stands only for the proposition that an employee who regularly and continuously performs bargaining unit work will be included in the bargaining unit, even though he devotes less than 51% of his time to unit work. The evidence submitted by the Employer here demonstrates that Aviles and Morales do not spend from one-third to one-half of their time selling



merchandise and dealing with customers, as the Regional Director incorrectly found (Supp. Dec. p. 19), but that 100 percent of their time is spent in doing display department work.

Accordingly, since Aviles and Morales are not dual service employees, and they work solely in the display department which was specifically excluded \* from the voting unit, they were not in the unit on the election day and were, therefore, not eligible to vote. In view of these facts, the challenges to their ballots must be sustained.

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\* It is respectfully submitted that since the parties, with the Regional Director's approval, agreed to exclude the display department employees from the eligible unit for voting and the election was conducted in accordance with this stipulation, neither the Union nor the Regional Director can at this late date alter the agreement merely because the Union feels the votes of these excluded employees might be favorable to it.

## B. THE OBJECTIONS

### 1. OBJECTION 1

#### A. The Misrepresentations in the Union's Election Eve Leaflet.

The evidence presented by the Employer during the investigation establishes that the Union intentionally misled the employees concerning its initiation fees and dues.

Thus, in the handbill distributed by the Union as the employees were leaving work on the night before the election (Supp. Dec. Attachment A), the Union stated:

"As we have stated before at our meetings and we now confirm it to you on this handbill -- the initiation fee to be a member of this Union is \$5.00 and the dues are in proportion to your weekly salary."

That this statement misrepresented the actual initiation fee and dues which employees would have to pay if they joined the Union was demonstrated by the Union's own constitution which the Employer submitted to the Regional Director. The pertinent provisions relating to the initiation fees and dues are annexed hereto as Employer's Exhibit 4.

The Union constitution, Part IV, Article A, Section 2, specifically provides that the initiation fee shall be Twenty Dollars (\$20.00) except that the fee for part-time workers shall be Twelve Dollars (\$12.00).

In finding that the Union did not misrepresent the initiation fees, the Union and the Regional Director apparently rely on the sentence in the Union's constitution which states that the General Council may reduce the initiation fee for special organization purposes. However, the Regional Director refers to no substantive evidence that the General Council had in fact reduced the initiation fee to \$5.00 for "special organization purposes".



Moreover, and more important, the leaflet deliberately fails to state that the \$5.00 initiation fee applies only during the organization period, and that once the Union is elected, the employees would have to pay an initiation fee of \$20.00.

Certainly, employees who have not joined the Union during the organizational campaign prior to the election would be less likely to vote for the Union if they knew that they would have to pay an initiation fee of \$20.00 and not a \$5.00 fee, which the Union untruthfully assured them was the initiation fee they would be obliged to pay.

The Union leaflet distributed at the last evening before the election also misrepresented to the employees the amount of dues they would have to pay. The leaflet states:

"\*\*\* the dues are in proportion to your weekly salary."

(Supp. Dec. Attachment A)

In fact, the Union constitution provides that all monies due the Union constitutes dues.

Part IV, Article C, Section 2(b)(4) provides:

"All initiation fees, assessments, fines, or other obligations owed by any member to the Union shall be merged with and become part of the dues owing by that member."

The constitution provides, Part IV, Article C, Section 1(a), that members absent from a meeting shall be required to pay a fine of \$1.00 for every such absence. Clearly, this is not in proportion to the member's weekly salary, as the Union leaflet led the employees to believe. The constitution, Part IV, Article B, Section 5(a), requires that every member must pay "inactive dues" of \$5.00 per year at the time he or she becomes inactive. This, again, is not in proportion to the employee's weekly salary. Part IV, Article C, Section 2(a)(1) provides that minimum dues for members employed part-time in Union shops shall be \$2.00 per month. Part IV, Article

C, Section 2(a)(2), requires that members who are not employed in a Union shop or who are ill or absent from employment must pay Union dues of \$2.00 a month. Again, these are dues which are not in proportion to the member's weekly salary.

Part IV, Article C, Section 2(a)(3), provides that members who receive welfare benefits or sick pay from any source shall pay dues on the amount of welfare benefits and sick pay received. Part IV, Article C, Section 2(a)(4), requires unemployed members to pay \$1.00 per month dues. Again, this is not in proportion to their weekly salary. Part IV, Article C, Section 3, requires that a dropped member, to be reinstated, must pay not only all his or her financial obligations to the Union, but also a reinstatement fee of not less than \$20.00. Since this becomes merged with and part of dues owing by that member, such taxes, assessments and reinstatement fees constitute dues under the terms of the constitution, and are clearly not in proportion to the member's weekly salary.

The Regional Director's conclusion that there was no misrepresentation concerning dues because the initiation fee was "correctly publicized as a fixed figure" (Supp. Dec. p. 4) is erroneous upon its face. The thrust of the Employer's position is that the Union concealed from the employees the fact that the initiation fee, as well as all the other obligations and charges, became merged into the dues obligation. Accordingly, the Union's assurance to the voters that they would only have to pay dues in proportion to their earnings was not corrected by the fact that the Union mentioned initiation fees as a fixed sum without also explaining that employees would be held liable for initiation fees as dues.

Moreover, in view of the substantial list of financial obligations which become merged into dues, the Union's specifying only one of



these items as a fixed sum does not correct the misrepresentation as to the others. In addition, as has been shown, the Union misrepresented the amount of the initiation fee itself.

The Regional Director's next conclusion that the Union's failure to advert to the fact that all monies due the Union constitute dues is merely an ambiguity and not a misrepresentation "in effect sweeps such misrepresentation under the rug." Collins & Aikman Corp. v. NLRB, 383 F.2d 722, 727 (C.A.4).

Obviously, if the employees realized that they could become obligated as a condition of employment to pay substantial additional amounts of money over and above an amount proportionate to their weekly salary, they would be less likely to vote for the Union.

The Union's misrepresentation was heightened by the explanation in the Union's election eve leaflet that the dues were needed to support the organization, a basis which the employees might be willing to accept. But they might not be agreeable to pay dues for fines for not attending membership meetings, assessments on their welfare payments and sick pay, and any taxes and assessments which the Union's General Council might adopt.

The most patently preposterous conclusion of the Regional Director is that the employees could evaluate the issue of dues and assessments because the Employer had explained the Union's dues and assessments in a previously issued leaflet.

It must be borne in mind that such matters as Union initiation fees and dues are matters concerning which the Union has special knowledge, so that the Union's misrepresentation would carry particular weight with the employees because they were spoken by the one in an authoritative position to know the truth. Not only would the employees be more likely to believe the Union's explanation of its own dues and initiation fees, but it will be noted that the Union's

election eve leaflet branded the Employer's explanations as "lies". The Union explains that it issued the leaflet because of the Company's "tricks and lies". It then goes on to state that the Company's mention of dues and initiation fees "is just another lie". In one way or another, the Union calls the Company a liar at least five times in this leaflet, and the entire tenor of the leaflet is that the Employer is not to be believed.

When it is realized that the Union waited until the eve of the election to issue its leaflet contradicting the Employer's attempted explanation\* of the Union's dues and initiation fees so that even if the employees would believe it, the Employer was not in a position to reply, it is apparent that the employees had no opportunity to or could not reasonably evaluate the issue, as the Regional Director incorrectly concludes. (Supp. Dec. p. 4).

Such conduct by the Union was particularly condemned by the Board in Gummed Products Company, 112 NLRB 1092, 1094, where the Board vacated an election when the Union repeated on the eve of the election misrepresentations in the face of contradictions by the Employer. The Board stated:

"The Petitioner's false statements of fact . . . repeated on the very eve of the election in the face of a direct contradiction by the Employer, were entitled to greater than ordinary weight. Under the circumstances of this case, the Board is of the opinion that the Petitioner's conduct exceeded the limits of legitimate propaganda and lowered the standards of campaigning

\* The Regional Director was advised that the Employer's explanation was distributed eight days prior to the election, yet the Union waited until the eve of the election to come out with its leaflet contradicting the Employer's explanation.



to a level which impaired the free and untrammelled expression of choice by the employees herein."

The Board has held that the cost of joining and remaining members in a union "are very important matters to employees".

The Trane Company, 137 NLRB 1506, 1509. See, also, Bata Shoe Company, 116 NLRB 1230, 1242.\*

The misrepresentations concerning the Union's dues and initiation fees separately are sufficient to invalidate the election. Together, these misrepresentations utterly distorted the costs of Union membership and benefits to the employees. As it has been shown that these misrepresentations concern matters of vital concern to prospective Union members, that they are matters concerning which the Union has special knowledge of the true facts, that the Union's misrepresentations carried particular weight as spoken by one in an authoritative position to know the truth, that the employees had no way of gaining independent knowledge of the falsity of the Union claims, that the misrepresentations were so timed to prevent any reply by the Employer, the election should be set aside on this ground alone.

**B. Misrepresentations Concerning the District 65 Security Plan.**

The Employer submitted to the Regional Director affidavits of two employees to the effect that at Union meetings, Mario Abreu, the Union vice-president in charge of organizing the Kress store, or the man who was running the meeting, distributed a pamphlet describing the benefits in the District 65 Security Plan\* and

\* In Bata Shoe Company, the decision to set aside the election because of misrepresentations concerning union dues was by a vote of 2 to 2.

\* The District 65 Security Plan is a health and welfare plan.

specifically told the employees that the Union had this plan in all its contracts.

Thus, the affidavit of one employee states as follows:

"At the meeting, Mario Abreu, who was the chief Union man, told everybody present about the benefits of belonging to the Union. One of the main things I remember was Mr. Abreu telling us about benefits in the Union's Health and Welfare Plan. He gave out the pamphlets which were printed in both Spanish and English. The booklet was entitled 'RESUMEN DE BENEFICIOS BAJO EL PLAN DE SEGURIDAD DE DISTRITO 65'. Mr. Abreu told us that the Union had this plan in all its contracts. He said when the Union got into the Kress store, we would get these benefits."

The other employee in an affidavit described the statement made by the Union as follows:

"At one of the meetings, the Union man who was running the meeting handed out a booklet on benefits. I believe it was entitled 'RESUMEN DE BENEFICIOS BAJO EL PLAN DE SEGURIDAD DE DISTRITO 65'. He told us that the Union guaranteed that we would get every one of the benefits in this booklet. He said the Union had this benefit provided for in every one of its contracts."

Despite these affidavits, the Regional Director concluded that this evidence is insufficient to establish that the Union specifically told employees all its contracts contained its Security Plan. (Supp. Dec. p. 7) Apparently, the Regional Director came to this conclusion because Abreu denied making the statement, and because three other employees who had previously told the Employer's Director of Management that they had also heard Abreu make this statement would not say this to the Board agent (Supp. Dec. p. 4). Contrary to



the Regional Director, we submit that at the very least a conflict of testimony is involved which requires a hearing before a final determination can be made. Certainly, it is not for the Regional Director to determine whom he will believe and whom he will not believe. He is not set up as a tribunal, but solely as an investigator in this proceeding.

It is well settled that a Union claim that it has obtained certain benefits in all its contracts constitutes grounds for setting aside an election if, in fact, there exists even one contract which does not contain such benefits.

NLRB v. Bata Shoe Company (377 F.2d 821, 830, 831 (C.A. 4) is directly controlling both factually and legally upon the instant case. In that case, the Fourth Circuit Court of Appeals, with Supreme Court approval, held that an election was invalid where a union had falsely stated, in enumerating various contract benefits which it had gained in the New York area, that all such contracts provided free clinical care. In fact, it was shown that in at least one such contract in the New York area, no provision was made for these benefits.

In refusing to enforce the bargaining order based on the election, the Fourth Circuit said:

"In our opinion, any misrepresentation of fact in respect to medical benefits in the New York contracts would be material -- for this is a matter of vital concern to the ordinary worker.

\* \* \*

That all New York Union contracts contain superior health, pension and wage benefits, matters of importance to employees . . . are . . . representations which when false may substantially prejudice a company."

Similarly, in N. L. R. B. v. Bonnie Enterprises, Inc., the union, as in the present case, stated that "all of its contracts" contain certain benefits which, in fact, had been negotiated in only certain contracts. The court held in that case that the misrepresentation that such benefits had uniformly been obtained in all area contracts invalidated the election.

The Employer in the instant case presented evidence that in at least one contract, The National Letter Shop, the Union had not been successful in obtaining the District 65 Security Plan. Certainly, it is a logical assumption, as the Employer pointed out, that the Security Plan was not part of this contract when the Union, in describing the National Letter Shop contract in its official newspaper omitted any reference to the Security Plan. In contrast to this, in all other contract settlements reported, the Union specifically set forth that the Security Plan was a term of the settlement.

The Regional Director's summary dismissal of the evidence on the bald assertion by the Union that the National Letter Shop is a member of an association which has a contract with District 65 which contains the Security Plan, is unwarranted. It does not appear that the Regional Director ever saw this alleged contract, but merely accepted the Union's unsubstantiated claim that there was such a contract, and the contract contained such a provision.

It will be noted that the report of the contract settlement which appeared on page 1 of the March 1972 issue of the Distributive Worker, the official Union organ, says nothing about the National Letter Shop being a member of any employer association under contract with the Union. A copy of this article is annexed hereto as Employer's Exhibit 5.

The Employer has shown that the Union made substantial misrepresentations about material facts which, if sustained, would



warrant invalidating the election. In rejecting this evidence on the basis of his own unilateral determinations of disputed fact, the Regional Director committed prejudicial error. We submit that at the very least, if this election is not vacated, a hearing should be directed at which the Employer would have the opportunity to cross-examine witnesses and subpoena Union documents, as the prima facie case made before the Regional Director demonstrates that the Union misrepresented to the employees that it had obtained the District 65 Security Plan in all its contracts when, in fact, it does not have the Security Plan in all its contracts.

## 2. OBJECTIONS 2 and 4

The Employer excepts to the Regional Director's refusal to find merit in Objections 2 and 4.

### A. Relevant Facts

On or about Tuesday, May 2, 1972, Union Vice President Mario Abreu, who led the Union's organizing campaign, brought U.S. Congressman Herman Badillo and Commissioner Irma Santaella of the New York State Human Rights Commission to personally visit the store (Supp. Dec. p.2). "The Distributive Worker" of May 1972 (attached as Employer's Exhibit 6) pointed out that Congressman Badillo and Commissioner Santaella told the workers to vote for the Union. As noted in the attached affidavit of Bernardo Martinez (Employer's Exhibit 7), Mr. Badillo told the employees that "if the Union won, they would get wage increases even though the Government had frozen everybody else's wages. Mr. Badillo also told the employees that if the Union won the election, they would get a Puerto Rican manager in the store." Union organizer Mario Abreu "admits that Congressman Badillo may have made such statements because, as Abreu put it, "this is one of his many fights." (Supp. Dec. p. 8)

As noted by Martinez, when the Union organizer pointed to him as a Company man who would vote against the Union, "Congressman Badillo told me to vote for the Union, that I would get more money." In the subsequent affidavit submitted by Mr. Martinez to the Board, he pointed out that Congressman Badillo expressly advised the employees that there was no likelihood that the Company would close the store since three new Federal projects were scheduled to open in the area, thereby implying that doing as Badillo advised -- vote for the Union -- would aid the community by virtue of Mr. Badillo's high political office.

The day prior to the election, the Union again stressed its close relationship to Congressman Badillo in its leaflet distributed by the Union outside the store (Supp. Dec. p. 3, Attachment at p. 2). This leaflet states:

We have been informed by the Honorable Congressman Herman Badillo that there are three projects to be built and have been approved by the Federal, State and City Governments for this community, and the Company realizes that when they are built, it will give further growth and more profits to the Company.

The participation by Congressman Badillo and Commissioner Santaella in this election proceeding and the imposition of racial prejudice by Congressman Badillo by asserting that the Company discriminated against Puerto Ricans by failing to make them supervisors, and that the Company would not place a Puerto Rican into the position of store manager unless it was pressured by the Union (See Employer's Exhibit 7) -- together with his promise of benefits through the institution of three new projects in the area as a result of the Union's political clout -- is plainly objectionable conduct that would have invalidated the election had such conduct been committed



by a high government official in favor of the Employer. This Board has invalidated election after election where the town officials whether they be Mayor or City Council have attempted to aid employers by pointing to the economic benefits to the community if they voted No Union. See Universal Manufacturing Corp. of Mississippi, 156 NLRB 1459, Henry L. Siegel Co., 172 NLRB No. 88, 69 NLRB 1095 (1968), enforced as modified not here relevant, 417 F.2d 1206 (C.A.6, 1969), cert. denied 398 U.S. 959, Dean Industries, Inc. & Howard Stafford, Mayor of Pontotoc, Mississippi, 162 NLRB 1078, 1092-1084 (1967); Proctor-Silex Corporation, 159 NLRB 598 (1966). Certainly, if the Employer could be held liable for threats of the Mayor in Henry Siegel Co., *supra*, the Union should be held responsible for the statements alleging racial prejudice to the Company by Congressman Badillo as he walked through the premises accompanied by the Union organizer. For, as the Trial Examiner said, with the approval of the Board, in American Newspaper Guild, AFL-CIO, etc., 151 NLRB 1558 at p. 1568 (1965), the Union "must therefore bear responsibility for the actions of the persons of whom they made allies in their campaign as well as for the concurrent acts and conduct of their own officers [and] representatives."

indeed, by placing stress on the racial composition of the employees of the Employer, the Union by its ally, Congressman Badillo, plainly violated the Board's standards established in Sewell Manufacturing Company, 138 NLRB 66 to evaluate election campaign propaganda on racial matters. As noted in Universal Manufacturing Corp. of Mississippi, *supra*, 156 NLRB at 1465, "the Board will not tolerate racial propaganda unless it meets the following conditions: the statements must be truthful, temperate, and germane to a party's position; and they must not 'deliberately seek to overstress and exacerbate racial feelings by irrelevant inflammatory appeals.' "

Thus, in the instant case, the Regional Director expressly found that Congressman Badillo's statement that the Company did not employ Puerto Ricans as supervisors, was plainly contrary to the facts, since the Employer did have Puerto Rican supervisors. Despite this untruthful statement, the Regional Director found this objection without merit (Supp. Dec. p. 8). This finding is plainly contrary to the Board's well settled rule that such false inflammatory racial statements "overstepped the bounds of permissible campaigning and so lowered these standards that the uninhibited desire of the employees could not be determined in the election." Universal Manufacturing Corp. of Mississippi, supra, 156 NLRB at 1465.

Similarly, the presence of Congressman Badillo and Commissioner Santaella at the store three days before the election, and the Union's repeated stress that it was close to the "Honorable Congressman Herman Badillo" (Attachment A to Supp. Dec.) makes it clear that the Union and the Congressman attempted to influence the employees to vote for the Union by giving, as it were, the official Government imprimatur to the Union. This is no different than what occurred in Henry J. Siegel Co. v. NLRB, supra, 417 F.2d 1206, 1214 (1969) "where the employees knew that Keaton was the Mayor, and as such spoke for the town \*\*\*. Consequently, the employees had it from 'the horse's mouth' that the town and the company were working in tandem for what they considered to be the best interests of the Company." In the case at bar, the only difference is that Congressman Badillo was in favor of the Union and the employees had it from "the horse's mouth", supra, that the Union and ostensibly the Federal government were working in tandem in support of the Union. This is plainly objectionable conduct justifying the setting aside of the election. For the Courts and the Board have repeatedly recognized that in labor



matters, the government of the United States from Board agent to General Counsel and Chairman of the NLRB, are legally duty-bound to be completely neutral, and the government -- whether it be Mayor or U.S. Congressman -- should remain aloof from this very conflict area. See International Union of Electrical R & M Workers v. NLRB, 383 F.2d 230, 233, N.Y. (C.A.D.C. 1967).

### 3. OBJECTIONS 3 and 6

The evidence submitted by the Employer in support of this objection demonstrates that the Union offered and actually gave economic inducements to the employees to convince other employees to be for the Union, or to vote for the Union themselves. Yet, the Regional Director summarily dismissed all of these objections without advising the Employer of any contradictory evidence, without giving the Employer a chance to be heard, and without even considering the facts on the record.

Thus, the Employer presented evidence that several employees had received checks in various amounts paid by the Union during the Union's pre-election campaign during the critical period before the election. The Regional Director dismisses this objection with the summary statement that this payment was reimbursement for pay employees did not receive from the Employer (Supp. Dec. p. 9). Not only did the Regional Director fail to apprise the Employer of this alleged explanation prior to the issuance of the Supplemental Decision, but the Regional Director's findings are actually contrary to the facts on the record.

Annexed hereto as Employer's Exhibit 8 is a copy of the affidavit of one of the employees who received a payment from the Union. This affidavit was furnished to the Regional Director during the course

of the investigation. As can be seen, contrary to the finding of the Regional Director, the money received by this employee from the Union was not to reimburse him for any lost pay, but to induce him to make an appearance which could convince other employees to vote for the Union.

We respectfully submit that the Board should not condone the granting of economic inducements to an employee to make it appear that the employee is a Union advocate, especially where the sole purpose is to influence other employees.

Again, the Employer submitted evidence that an employee had been offered a free trip to Puerto Rico, together with other things, if he would support the Union. This employee explains in his affidavit submitted to the Board agent that he was first approached by Mr. Abreu, the Union vice-president, while Abreu was in the store with Congressman Badillo, attempting to convince the employees to vote for the Union. In this encounter, Mr. Badillo called the employee aside and told him that "If I would help him to get the Union into the store, he would take care of me."

Two days later, on the day before the election, this same employee was approached by two of the leading Union proponents in the store who told him that the Union had instructed them to transmit its offer that if he would vote for the Union, it would pay for a round trip to Puerto Rico with all expenses paid for seven days. This offer was repeated on the morning of the election.

The Regional Director dismisses this objection because the Union witnesses involved deny making the offer (Supp. Dec. p. 10).

We respectfully submit that since the Regional Director has evidence from one employee that such an offer was made to him, the fact that Union witnesses deny it does not warrant dismissing this objection out of hand. The denials merely raise questions of fact which require a hearing.



Again, in Objection 6, the Regional Director dismisses the Employer's objections that the Union unduly influenced voters by publicizing its arrangements for a victory party in advance of the election results.

It is apparent that the Regional Director failed to consider this aspect of the Employer's election objections at all. Instead, the Regional Director completely ignores the evidence submitted by the Employer and accepts without question the contentions of the Union's vice-president as to what he said. Then, based solely on the Union's vice-president's statements, which are in conflict with those submitted by the Employer, the Regional Director finds that the Union's conduct did not impair the "laboratory conditions under which the election should be run". (Supp. Dec. p. 20).

On the contrary, we respectfully submit that where prior to the closing of the polls, a party tries to make the employees believe that it has already won so that a vote against it would be useless, the laboratory conditions in which the election should have been conducted are destroyed and the election should be set aside. Stern Brothers, 87 NLRB 18.

#### 4. OBJECTION 5

The Employer excepts to the Regional Director's failure to find that the actions of Mario Abreu, the chief Union representative, in stationing himself in the area of the information or service desk during the voting hours, and electioneering while the employees were going to vote, constituted grounds for invalidating the election.

The election was conducted on the stockroom floor which would only be reached by a stairway leading off the aisle next to the information desk. A diagram showing the information desk area is annexed hereto as Employer's Exhibit 8-a. To maintain the area

where the employees had to pass to vote free of electioneering by the parties, the Board agent designated the area around the bottom of the stairs including the area in front of and around the information desk off limits to all Company supervisors and Union representatives. All parties, including the Union representatives, agreed to this. The affidavit of the Employer's attorney who attended at the pre-election conferences and participated in this arrangement is annexed (Employer's Exhibit 9).

The Employer presented evidence that in direct violation of his agreement and of the Board agent's instructions, Abreu stationed himself in the no-electioneering area and electioneered among the employees as they were going to vote.

The affidavit of George Culbertson, which is annexed hereto as Employer's Exhibit 10, shows that Abreu not only spoke to employees in the no-electioneering area himself, but that he utilized the services of an off-duty employee, Alfonso Narvaez, to talk to other voters during voting hours.\* Mr. Culbertson's testimony was substantiated by the testimony of Bernardo Martinez who not only saw Abreu talking to the employees while Abreu was in the no-electioneering area, but he also heard Abreu tell employees to vote "Yes" at another time during the voting hours when employees,

\* The Regional Director committed prejudicial error in rejecting the testimony of the Employer's witnesses and dismissing this objection because Union witnesses denied that Abreu spoke to employees in the no-electioneering area. Culbertson's testimony was substantiated by Martinez and, as shown above, employee Fernandez testified that he was solicited by Abreu in the no-electioneering area as he was going to vote. At the very least, if there is a conflict in the evidence, this raises a substantial issue of material fact which should be resolved by a hearing. It is no, answer, as the Regional Director notes, that Culbertson should have brought Abreu's action to the attention of a Board agent. Culbertson was merely obeying the Board agent's



on their way to work, had to pass by the lunch counter area next to the service desk where Abreu had stationed himself.

Employee Fernandez also testified that Abreu spoke to him as he was going to vote and told him he was counting on him to vote for the Union. Abreu was standing right by the staircase leading up to the voting area, which places Abreu directly in the no-electioneering area when he solicited Fernandez' vote.\*

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- \* (Continued) instructions to stay away from the no-electioneering area. He could not himself approach the no-electioneering area without being guilty of himself violating the Board agent's instructions, and there was no Board agent in sight when Culbertson observed Abreu violating the Board agent's instructions.
- \* Prior to the issuance of the Supplemental Decision, the Employer was not aware that the Regional Director placed the conversation between Abreu and Fernandez on the other side of the information desk in the direction of the lunch counter. Although we submit that Abreu's action in electioneering, even in the location set by the Board, was improper, we have asked Fernandez to specify again exactly where his conversation with Abreu took place. As can be seen from the annexed affidavit given by Fernandez, he again places the conversation he had with Abreu immediately prior to his going to vote in the area of the information desk right by the staircase leading up to the voting area which is squarely in the no-electioneering area. It will be noted that Fernandez states that it appeared that Abreu was standing there waiting for people to pass him by so he could speak to them. Fernandez explains that he also had another conversation with Abreu which occurred earlier in the day but also during voting hours, in which Abreu solicited Fernandez's vote. This first conversation took place in the area between the information desk and the lunch counter. (Employer's Exh. 11)

It will be noted that the Regional Director's statement that there was a row of telephones between the lunch counter and the information desk (Supp. Dec. fn. 15) is incorrect. The row of telephones was installed after the election. The area between the lunch counter and the information desk was open at the time of the election.

The Regional Director erred in rejecting the Company's contention that the election should be set aside under the Milchem rule, 170 NLRB 362, 67 LRRM 1395 (1967) as a result of the improper conduct of Union Organizer Abreu "within the no-electioneering area fixed by the Board agent" and agreed to by him. (Supp. Dec. at p. 13, emphasis in the original). In Milchem, Inc., *supra*, the Board established the rule that "conversations between a party and voters while the latter are in a polling area waiting to vote will normally, upon the filing of proper objections, be deemed prejudicial without investigation into the remarks." 170 NLRB at 363. In subsequent decisions, the Board has made it clear that the Milchem rule was to be applied strictly in the area in which electioneering is not to be permitted as "established by the informed judgment of the Regional Director and his agent conducting the election. They are on the scene and are familiar with the physical circumstances surrounding the location of the polls." Marvil International Security Services, Inc., 173 NLRB 1260. In Milchem, the Board pointed out that by attaching a sanction to the breach of this rule, "the rule assumes that the parties will painstakingly avoid casual conversations which would otherwise develop into undesirable electioneering" and insure that the parties "will take pains to assure complete compliance with the rule by issuing the appropriate instructions to "their agent, officials and representatives." (170 NLRB at 363.)

Thus, where a union agent has electioneered within the boundaries set by the Board agent, the Board has set aside the election of the winning union. Star Expansion Industries Corp., 170 NLRB 364 (1961); Modern Hard Chrome Services Co., 187 NLRB No. 11; 75 LRRM 1498 (1970). Totally disregarding the settled rule of the Board, the Regional Director has attempted in this case to cut back



from the Board's rule by, in effect, stating that although the Union agent electioneered within the proscribed area, this electioneering will not invalidate the election because it occurred "on the fringe of the proscribed area" (Supp. Dec. p.13), and attempts to support his position by reference to Harold W. Moore d/b/a Harold W. Moore & Son, 173 NLRB 1258. But, unlike this case, the electioneering in Moore took place not within the proscribed area -- but 30 feet from the entrance to the warehouse, which entrance was itself about 30 feet from the voting area (173 NLRB at 1258). Certainly, it would be an abuse of discretion for the Regional Director to change the electioneering boundaries after the election, when, as here, the Employer has complied and the Union has not. \*

We respectfully submit that Abreu's actions in engaging in a concerted program of electioneering in the store during the hours the polls were open, in stationing himself directly in the path of employees going to the polls and engaging in a conversation with them, whether he was stationed at the lunch counter or at the information desk, and in enlisting the services of an off-duty employee to extend the electioneering throughout the store during the voting hours, completely destroyed the laboratory conditions for voting and requires that the election be set aside.

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\* Nor is there any merit to the Regional Director's assertion that the Employer's representative was to blame for his failure to call the electioneering fact to the attention of the Agent. As set forth, supra, the Milchem rule expects the parties themselves, including the Union, "will take pains to assure complete compliance with the rule by instructing their agents, officials and representatives simply to refrain from conversing with prospective voters in the polling area." (170 NLRB at 363)

## 5. OBJECTIONS 7 and 8

As to Objection 8, the Regional Director once again misconstrues the grounds urged by the Employer for invalidating the election.

In this objection, the Employer contends that the holding of the election was improper because of the participation, instigation and sponsorship of the Union by supervisors and the Board erred in upholding the election in the face of evidence of such activity.

It is well settled that a representation petition is not valid where supervisory employees have sponsored or assisted the Union's membership drive. Toledo Stamping and Manufacturing Co., 55 NLRB 865. This rule was further applied in Desilur Productions, Inc., 106 NLRB 178 where citing Toledo Stamping, supra, the Board held that the Union's showing of interest was invalid because of supervisory participation in the solicitation on behalf of the Union. See also The Wolfe Metal Products Corporation, 119 NLRB 659, Southeastern Newspapers, Inc., 129 NLRB 311; c.f. Insular Chemical Corporation, et al 128 NLRB 93. As the evidence submitted to the Regional Director in this proceeding demonstrates, two supervisors, Josie Guzman and Haydee Feliciano instigated, initiated, encouraged and sponsored the Union among the employees.

Both Josie Guzman and Haydee Feliciano were specifically found to be supervisors in this proceeding. (Regional Director's Decision and Direction of Election, dated March 27, 1972).

The evidence submitted to the Regional Director showed that they were extremely and continuously active in all aspects of union activity including solicitation of authorization cards, arranging for, attending and participating in union meetings, urging and obtaining



union signatures on authorization cards and enlisting employees to solicit and support the union. It is not correct as the Regional Director notes that the Employer's attack on the conduct of these supervisors relates only to conduct which occurred prior to the filing of the petition herein. (Supp. Dec. p. 16). On the contrary, affidavits submitted during the course of the investigation of these objections demonstrate that at union meetings held in March, the Union officials introduced Josie Guzman as a member of the union committee whose function it was to try to get the girls in the store to join up with the union and to vote for the union. Mrs. Guzman as a member of the union committee also had the function of relaying questions from the employees in the store and passing on to them information from the Union.

The only basis given by the Regional Director for refusing to dismiss the proceeding was that the objections based on the conduct of these supervisors were not raised within five working days of the close of the hearing (Supp. Dec., p. 15).

We submit that the Regional Director's strict reliance on the five day rule is in error. There is no provision in the Board's Rules and Regulations and Statements of Procedure publicizing this five day rule. None of the published cases cited herein refer to any five day rule for raising this issue. The Employer brought this matter to the attention of the Regional Director and requested an administrative investigation more than a month prior to the election.

Under the circumstances here, since the facts establish that supervisors were involved in obtaining the union's showing of interest and in actually participating in the union's affairs as members of the Union committee to an extent even greater than that found in the above cited cases, the proceeding herein should have been dismissed, and the election, therefore, should be declared a nullity.

As to Objection 7, the Employer has shown that even after the petition for election was filed the admitted supervisor Josie Guzman attended the union meeting, was introduced to the employees as a member of the Union committee whose function it was to try to get the girls in the store to join the Union and to vote for the Union. Employees were also advised that as a member of the Union committee, she would act as the Union's voice in the store. Such conduct must be found to have denied the employees a free and uncoerced opportunity to select a bargaining agent and the election should be set aside.

In Turner's Express Inc. v. NLRB \_\_ F2 \_\_, 79LRRM2796 (CA 4 , 1972) the Court refused to enforce a bargaining order sought against the Company because of its refusal to bargain with a newly certified union. The Court pointed out:

"The law is clear that supervisory pressure upon employees in the selection of a bargaining representative is coercive. It is not necessary that it be proved that such pressure and coercion affected the result of the voting".

In NLRB v. Metropolitan Life Insurance Co., 405 F2d 1169 (CA2, 1968), the Court held that the certification of the union was invalid because certain supervisors were erroneously included in the bargaining unit. The Court stated:

"Accordingly, since it is not know to what extent, if any, the watch engineers and the assistant air conditioning engineers engaged in pro-union activities and perhaps influenced the voting pattern of other employees, we cannot be sure that the 'laboratory conditions' the Board holds are essential to a valid election have not been disturbed."



In this case it is evident that supervisors engaged in pro-union activities specifically designed to influence the voting patterns of other employees. Accordingly it must be found that the laboratory conditions essential to a valid election have been disturbed and the election invalidated.

### CONCLUSION

The facts and arguments recited above establish that the Supplemental decision contains numerous errors in fact and law. It has been shown that the Regional Director failed to follow existing precedent, made ex parte determinations of the credibility of witnesses on disputed, substantial and material issues without a hearing \* failed to consider pertinent evidence submitted or to resolve issues involved and prejudicially affected the rights of the employer.

It is respectfully submitted, therefore, that there exists compelling reasons for the Board to grant review of the Supplemental Decision and that upon review, there exists sufficient basis for the Board to uphold the Employer's objections and set aside the election held on May 5, 1972 without further proceedings in the event a new tally of ballots indicates that the Union received a majority of the votes cast.\*

\* As the annexed letter to the Regional Director shows, the Employer specifically requested that a hearing be held (Employer's Ex. 12)

\* The Employer moves that all affidavits taken from all witnesses submitted to the Board by the Employer and all affidavits taken from witnesses for the Union should be submitted to the Board in order that the Board may properly examine the facts of the case. The Employer further moves that the Board revise its policy of not considering documents submitted to the Regional Director and consider all documents here submitted. See Southwestern Portland Cement Co. v. NLRB 407 F.2d 131 134-135

In the alternative, it is urged that a hearing be directed on the disputed issues of substantial and material fact so that all issues involved in both the challenges and objections may be considered.

Respectfully submitted,  
SELIGMAN & SELIGMAN

BY: /s/ Madeline Balk

\* (Continued) (C.A. 5, 1969) cert. denied 396 U.S. 820 (LTV Electrosystems, Inc., 166 NLRB 938, fn. 2 at 938 (1967) should be reversed), Cf. NLRB v. Sunshine Convalescent Hospital, 79 LRRM 2671 (C.A. 9, 1972) enforcing 187 NLRB No. 98 is not in point because unlike the instant case, the affidavits were available to the employer. Similarly, Lipman Motors v. NLRB 78 LRRM 2808 (C.A.2, 1971) is not in point since the Employer did not request the Board to consider such affidavits and did not except to the Board's failure to consider them.



STATE OF NEW YORK )

: SS:

COUNTY OF NEW YORK )

FRANK MARKS deposes and says:

I am the manager of the S. H. Kress store located at 1915 Third Avenue, who previously gave a statement to the NLRB in connection with S. H. Kress Co., Case No. 2-RC-15824.

I was present during the pre-election conference when the Union representatives stated their reasons for challenging Martinez. The only reason the Union gave was that he was a guard.

With respect to the function of responding to bells that are rung by salespeople seeking assistance and getting change for cash registers, the following employees who voted in the election without challenge perform this function more frequently than Martinez: Yolande Zambianchi, Susie Diaz, Martha Machuca, Mary Gomez, Gloria Velasquez, and Lydia Matias. These people have been performing this function during the period before the election and continuing to the present time. As to signing for refunds, Delia Melendez and Gloria Velasquez, employees in the unit who voted without challenge, and now Elva Otero, another non-supervisory employee, do this. Melendez and Velasquez who performed this function at the time of the election and prior thereto, and now Elva Otero, perform this function of signing for refunds without prior approval by any supervisor. At any time Martinez might have signed for refunds, he had to get prior approval from the store manager. All of the people named above are regular sales personnel and are not managerial or supervisory employees or guards. I categorically deny that Martinez has ever been given the function of handling "voids" and to my knowledge he has not done so.

(MARKS' AFFIDAVIT - EMPLOYER'S EXHIBIT 1)

Martinez was an experienced stockman who had been with the Company for many years. The experienced stockman who had been in the store for many years and who had left the Company's employ before the election was earning about 40 cents an hour more than the rate paid Martinez. At the time of the election there was only one other full-time stockman in the store. His rate was less than that of Martinez because he had less experience and was a new employee having been employed only about six months at the time of the election.

I have been advised that the experienced stockman who left the Company's employ before the election, which was held on May 5, 1972, had been employed in this capacity for a long period of time. While working in this same capacity he had voted without challenge in the prior election held at this store. Martinez was hourly paid and received overtime pay when he worked overtime. He received the same fringe benefits as all other employees in the unit. He worked the same hours as the stockman and the porters who voted in the election without challenge, and he performs his work in close proximity to the other employees in the unit.

I categorically deny that during the period I have been the store manager (from March 29, 1972 to August 27, 1972) Sonia Morales and Marie Aviles spent any time at all in selling work after they were transferred to the Display Department. After these employees were trained in the Display Department, they have discretion in merchandising planning and arranging the displays.

It is not true that they were called away from trimming windows to sell. During times when they were not trimming windows they made signs, did interior displays, dressed mannequins and revamped counters for display purposes. Their work is solely and completely display department work and they do no selling. There are eleven (11)



windows in the store facing the street. These windows have been changed frequently since April. Only one, the infants wear window, was left in for a longer period of time, but even though this window was not completely renovated as were the other windows, merchandise displayed in the window was changed by Morales and Aviles.

During the months of June and July, 1972, the agents of the National Labor Relations Board visited the Third Avenue store which I managed, to interview witnesses and examine Company records as part of the investigation of the objections and challenges in this case. On at least three different occasions during this period, at least two Board agents interviewed Porfirio Fernandez.

I make this statement voluntarily and it is true and correct.

/s/ Frank Marks

Sworn to before me this  
29th day of August, 1972.

/s/ Madeline Balk

Notary Public, State of New York  
No. 24-5161450  
Qualified in Kings County  
Commission Expires March 30, 1974

STATE OF NEW YORK     )  
COUNTY OF NEW YORK    )     ss:

BERNARDINO MARTINEZ deposes and says:

I am the same Bernardo Martinez who formerly gave an affidavit to an agent of the National Labor Relations Board concerning my job functions. I herewith state that during the nine to ten years of my employment with S. H. Kress & Company, I worked primarily as a stockman and also did some maintenance work. Only during a short period of several months out of this nine to ten year period did I perform some guard work for two or three days a week. These guard duties were performed while I worked at the Fifth Avenue store, and I did not perform such duties after I was transferred to the Third Avenue store on February 15, 1972.

I make this statement voluntarily and it is true and correct.

/s/ Bernardo Martinez

Sworn to before me this  
29th day of August, 1972.

/s/ Madiline Balk

Notary Public, State of New York  
No. 24-5161450  
Qualified in Kings County  
Commission Expires March 30, 1974

(MARTINEZ AFFIDAVIT - EMPLOYER'S EXHIBIT 2)



STATE OF NEW YORK     )  
                              :     ss:  
COUNTY OF NEW YORK    )

RICHARD D. BAWCOM deposes and says:

I am the Director of Manpower for S. H. Kress & Company. In such position I am familiar with the Company's established practices and policies regarding personnel. It is the Company's established practice that when an employee who has been employed for six months as of February 1 resigns, and such resignation takes effect after February 1 of any year, to pay vacation pay to such employee at the time of separation.

/s/ Richard D. Bawcom

Sworn to before me this  
29th day of August, 1972.

/s/ Madeline Balk

Notary Public, State of New York  
No. 24-5161450  
Qualified in Kings County  
Commission Expires March 30, 1974

(BAWCOM'S AFFIDAVIT - EMPLOYER'S EXHIBIT 3)

CONSTITUTION PROVISIONS RELATING TO  
INITIATION FEES AND DUES

(Employer's Exhibit 4)

Constitution, District 65  
National Council Distributive Workers of America  
A. L. A.  
13 Astor Place, New York City

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PART IV  
MEMBERSHIP

The Union, being a combination of workers who constitute its membership, exists for the benefit of and by virtue of their active and organized support

Article A  
ELIGIBILITY FOR MEMBERSHIP

Any person employed in or about any wholesale, retail, warehouse, department store, processing, office or other establishment, shall be eligible for membership in the Union, without regard to sex, national origin, color or religious or political beliefs or affiliations. Any such person shall be a member of the Union and shall receive an official Union membership book, if accepted by the General Council, after having complied with the following requirements:

Section 1. Signing and submitting an official application for membership.

Section 2. Paying in full the Union initiation fee. The initiation fee shall be twenty dollars (\$20) except that the fee for part-time workers (as defined by the General Council) shall be twelve dollars (\$12). The General Council may reduce the initiation fee for special organization purposes.



Section 3. Taking the pledge of membership. The Membership Pledge shall be:

"I solemnly pledge and promise to be a loyal member of District 65.

I will protect and support my fellow members and defend our Union's solidarity.

I will respect and abide by all provisions of our Constitution, laws, and regulations, and will fully comply with all decisions of the majority.

I will do all in my power to bring into our ranks all persons eligible for membership in our Union.

I will defend with all the strength I possess the Union's name, its honor, and its integrity.

All this I solemnly promise."

Section 4. Persons who are not members and who secure employment in Union shops may apply for membership, and shall be affected by such rules and regulations that the General Council may set forth for such applicants. The General Council shall determine how long an applicant must be employed in the industry before becoming eligible for membership in the Union.

#### Article B RIGHTS OF MEMBERS

Every member of the Union shall have the right to enjoy the full benefits of Union membership, derived from their unity, strength and efficiency.

Section 1. Every member has the right to work in a Union shop and secure full benefits of collective bargaining.

(a) Every member has the right to secure employment through the Union hiring hall.

(b) Every member has the right to vote on all terms of Union contracts affecting him or her.

(c) Every member has the right to vote on all strike calls and strike settlements affecting him or her.

(d) Every member has the right to receive such strike benefits as the General Council may deem practicable.

Section 2. Every member has the right to attend Union membership meetings and participate in the leadership of the Union.

(a) Every member has the right if he or she has been a member for at least two (2) months to vote in all elections and on all business at membership meetings.

(b) Every member has the right to serve on Union committees.

(c) Every member has the right to be a candidate for elective posts and for Union office.

(d) Every member has the right to make recommendations and proposals or to make criticism of any phase of Union activity, the activities of Union officers or committees.

Section 3. Every member has the right to utilize all the welfare services of the Union and participate in all Union welfare plans and programs.

Section 4. Every member has the right to participate in all social, cultural and athletic activities of the Union.

Section 5. Every member who leaves the industry, after having been a member for at least one year, has a right to retain inactive membership in the Union.

(a) Every member must pay "inactive dues" of five dollars (\$5) per year at the time he or she becomes inactive.

(b) Inactive members shall have only such rights as are included in Section 4 of Article B, Part IV of this Constitution, and the right to participate in such other activities as are specifically planned to



include such inactive members. Inactive members must respect all of the provisions of the Constitution and laws of the Union.

(c) Inactive members shall be automatically reinstated to active membership, with all rights of members, upon resumption of regular dues payments.

Section 6. Every member has the right to present charges against any member, officer or committee and receive a fair and open hearing on any charges in accordance with the provisions of this Constitution.

### Article C DUTIES OF MEMBERS

Every member of the Union shall have the obligation to contribute to the unity, strength and efficiency of the workers.

Section 1. Every member has the duty to share in the exercise of the supreme authority of the membership.

(a) Every member is obliged to attend membership meetings. Members who, for proper and just cause, are unable to attend a membership meeting, shall secure an official excuse from their Crew Steward. Members who, for proper and just cause, are unable to attend membership meetings over an extended period of time shall secure a general excuse, from their Executive Board. Members absent from a meeting without having secured an official excuse shall be required to pay a fine of \$1.00 for every such absence. Members who regularly absent themselves from membership meetings without securing official excuses shall be subject to disciplinary action by their Executive Board.

(b) Members who work on night shifts and other abnormal schedules of working hours which makes it impossible for them to attend their regular membership meetings, shall be required to attend

a regular monthly membership meeting to be scheduled and held at such time as will permit them to attend.

(c) Every member is obliged to preserve and defend orderly procedure at all meetings.

Section 2. Every member has the duty to share the cost of operating the Union.

(a) Every member has the following financial obligations:

1. Monthly dues (payable in advance and due on the first of each month) are as follows:

Members employed in union shops shall pay dues, based on regular earnings, at the rate of one and one-half (1 1/2%) percent of such regular earnings. (Regular earnings are defined as earnings for the regularly scheduled work week, and do not include non-guaranteed overtime).

Minimum dues for members employed part time in union shops shall be \$2.00 per month. No member shall pay an increase in dues, in 1970, greater than \$2.00 per month over his previous dues obligation, while employed in the same job and in the same shop. Thereafter, no member shall pay an increase in dues, in any calendar year, greater than \$2.00 per month over his December dues obligation in the previous year, while employed in the same job and in the same shop.

No member shall pay dues on regular earnings which are in excess of the annual amount, specified by the rules and regulations of the '65' Security Plan Pension Fund, on which benefits are computed.

2. Members who are not employed in a union shop, or members who are ill and absent from employment and have not received any welfare benefits or sick pay and have notified the union office, shall pay \$2.00 \* \* \*.

3. Members who receive welfare benefits or sick pay from any source shall pay dues on the amount of welfare benefits and sick pay received.



4. Unemployed members who are actively registered in the Union Hiring Hall, Retired members, and members employed in shops which are in the process of organization shall pay \$1.00 per month dues.

5. Such taxes and assessments as the General Council may adopt.

(b) 1. A member who is in arrears in his financial obligations for more than one (1) month shall not be regarded as in good standing and shall be automatically suspended. A suspended member shall not be entitled to enjoy the benefits and rights of Union membership.

2. A member who remains suspended for fifteen (15) days shall receive certified or registered mail to his or her last known address and if he or she fails to restore himself or herself to good standing within five (5) days of such mail shall be automatically dropped from Union membership, and if employed in a Union shop shall be obliged to leave the job.

3. A dropped member, after payment of all his or her financial obligations may apply to the General Council for reinstatement, and if reinstated shall be obliged to pay a reinstatement fee of not less than Twenty dollars (\$20.00)

4. All initiation fees, assessments, fines, or other obligations owing by any member to the Union shall be merged with and become part of the dues owing by that members.

Section 3. Every member has the duty to strengthen and defend the Union and to advance the aims of the membership.

(a) Every member is obliged to cooperate with the members of the General Council in carrying out the decisions of the membership.

(b) Every member is obliged to comply with the strike decisions of the membership and all terms of Union contracts.

(c) Every member is obliged to participate on picket lines, demonstrations and other such acts in defense of the membership.

"The Convention Council is determined to keep all wages low and limit all wage increases," Brown went on. "In this regard we want to alert the Council to additional difficulties we can expect. The Administration again intends to violate the intent of Congress. That body agreed increases for the second and third years, provided for in union contracts, should be automatic and should not be tampered

Vegetables, etc., continue to go up, up and up, and if we accepted Nixon's wage controls it would mean a cut in our real wages."

Pointing to a recent price survey, Brown noted that, since September, all but 6 of 33 items checked had risen in price from 3 to 26%. It shows that pork spare ribs have risen on average from 69 to 85 cents a pound, sugar from 23 to 27 cents, grape

the role it played in setting wage. Ryan to ... his bill making \$7,000 a year the minimum for wage controls, a bill that became part of the law that was eventually signed by the President. We intend to go on fighting for our members' rights to fair wage increases in the face of the continuing inflation, and that means all our members, regardless of their wage levels."

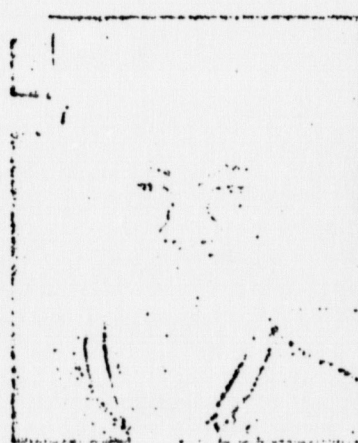
## Steward Wins Invite for Wife in Convention Drive

Steward Noel Francis has the distinction of being the first member to bring a shop under contract in the Convention Incentive Organizing drive (CIO), and win an invitation to the District 65 Convention. The shop, Whitney Check Duplicating, has 18 workers.

Close to 40 members are enrolled in the Incentive drive as The Distributive Worker goes to press and are receiving help from the Organizing Department as they work to achieve their goals. Members are urged to enroll so that many hundreds of unorganized workers may be brought under contract by Convention time.

Because Noel is an official delegate of the Convention, as are all District 65 stewards, his wife, Shirley, will be the guest, in accordance with the rules of the campaign. Noel and Shirley are parents of a 13-year old boy.

The upcoming '65' Convention will take place at Laurel's Country Club, Sacket Lake, New York, the week-end beginning Friday, October 20, 1972. District 65 Conventions always combine the serious business of the union—organizing the unorganized and participating in the struggle for peace, freedom and a decent life—with loads of



Noel Francis

fun, fine professional entertainment and an unforgettable week-end of all-round good fellowship. Noel says his wife is very happy about going.

Noel Francis has been a C5er for about two years and helped organize his shop, Henry Harris & Co., into the '65' Direct Mail Local. He has been a steward from the beginning.

An offset machine operator, he earns \$175 a week. He has made several attempts at organizing and Whitney Check Duplicating is his first success. It has encouraged him to go on trying to bring more unorganized workers under contract.

As a result of Noel Francis' organizing efforts, the 18 Whitney workers

## Letter Shop Wins 1st '65' Contract

It took a four-hour strike on March 14, but the National Letter Shop, with 5 workers, won wage increases ranging from \$15 to \$38.50 in the first year of their District 65 contract, and up to \$55 in the three-year period of the agreement.

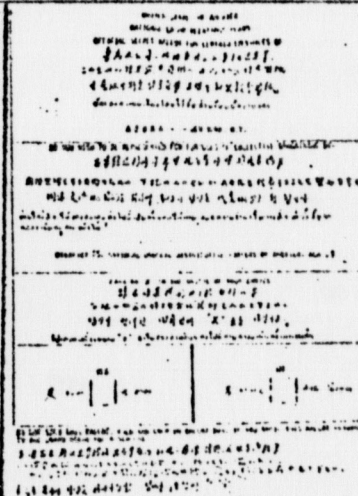
The pact also calls for two cost-of-living adjustments, and a \$100 a week minimum, immediately. It is effective, retroactively, November 14, 1971.

General Org. Pete Van Delft and Org. Ralph Pileggi are responsible for organizing the workers.

receive a \$23 wage increase over the two-year period of their District 65 contract. Actual increases based on job ratings go up to \$35.

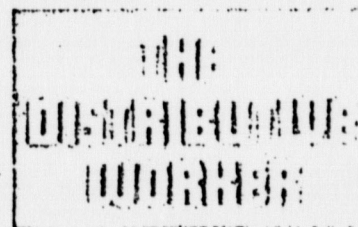
In addition the Whitney workers and their families are protected by one of the finest, comprehensive health coverage plans in the country, among many other things, through an employer contribution of 11% to the 65 Security Plan and Pension Plan. The shop also gets Martin Luther King's birthday as an additional holiday.

Good work, Noel. Keep it up! Come on, everybody, join the Convention Incentive Organizing drive and celebrate the good work you've done with a marvelous week-end at the Convention.



### AZUMA ELECTION

Photo above shows ballot in five languages for N.L.R.B. election among the 125 workers at 7 Azuma stores, March 22. Azuma workers hope for '65' victory to improve conditions. Ballot languages are Japanese, Chinese, Korean, Thai, English.



VOL. 4, No. 2

March, 1972



"The Distributive Worker" - May 1972.

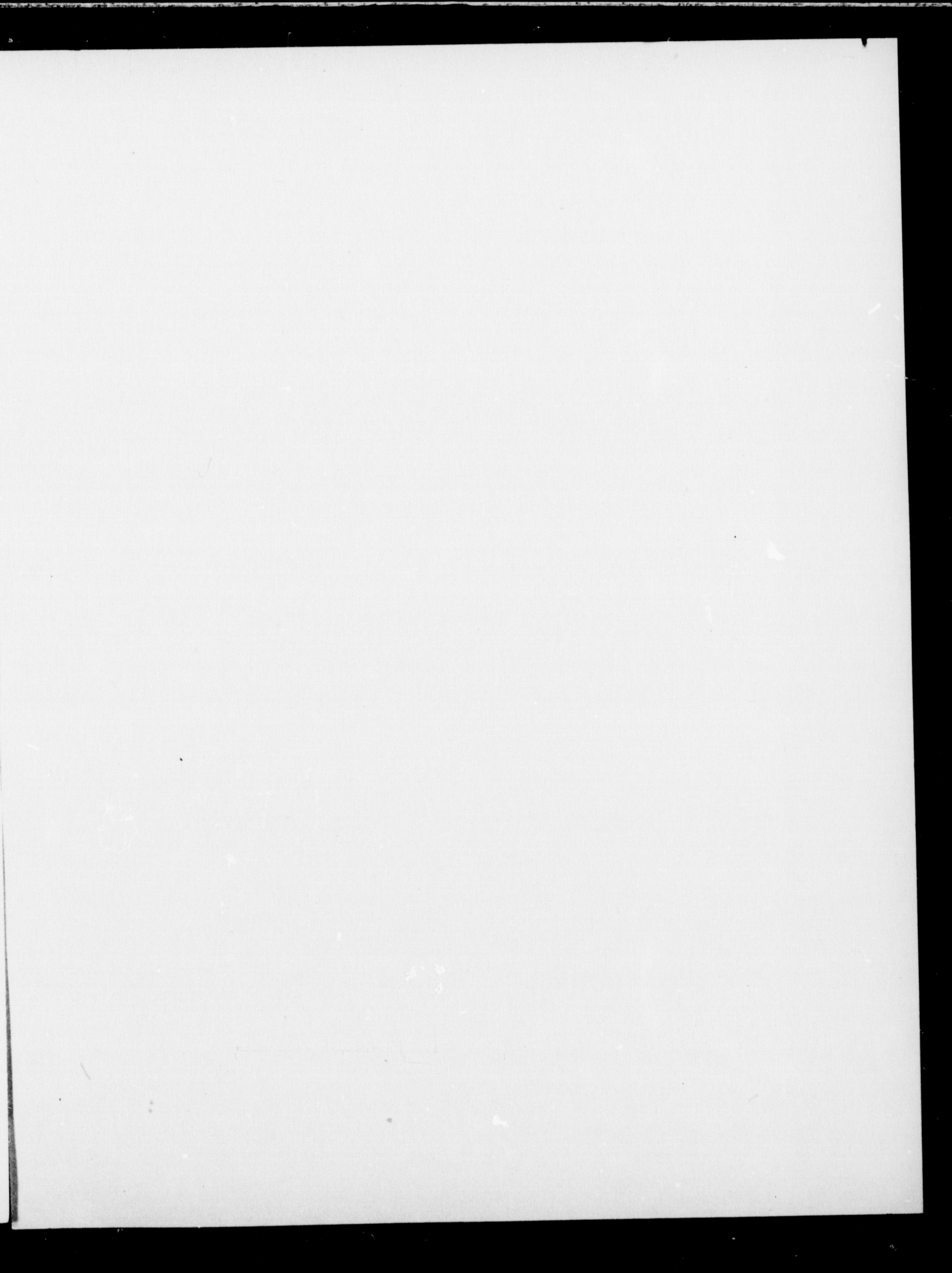
## ELECTION VICTORY AT KRESS

Variety chain store workers, who are among the lowest paid and most exploited in our society, succeeded in breaking through with an NLRB election victory, May 3, at Kress, on 106th Street and Third Avenue, New York City. A majority of the workers voted for the union, with 6 votes challenged.

Vice Pres. Mario Abreu, who led the drive at Kress for District 65, aided by a heads-up shop committee, believes that, when the challenges are resolved,

the workers will have scored a first victory in the "five and dime" industry.

The campaign was encouraged by public figures interested in improving the lot of the working poor. Congressman Herman Badillo and New York City Commissioner Irma Santaella visited the store, personally, and asked the workers to vote for the union. Among staff members who helped out in the drive were Org. Pete Irizarry and Distributive Worker Asst. Editor Gina Acosta.





STATE OF NEW YORK     )  
                              :           ss:  
COUNTY OF NEW YORK    )

BERNARDO MARTINEZ deposes and says:

I am employed at the S. H. Kress store located at 1915 Third Avenue, New York City, as a stock man. I have worked at this store since February 15, 1972. On Tuesday, May 2, 1972, while I was working in the store, Mario Abreu, who works for the Union, came into the store with Mr. Badillo, the Congressman for the Triboro District. Also another man who worked with the Union accompanied Abreu and Badillo. With these people was a lady, Irma Santaella who, I believe, is a Judge. All of these people walked around the store talking to the employees in the store, telling them to vote for the Union. Mr. Badillo told them that if the Union won, they would get wage increases even though the Government had frozen everybody else's wages. The lady Judge also told employees this. Mr. Badillo also told the employees that if the Union won the election, they would get a Puerto Rican manager in the store.

At one time, when I was near Abreu and Badillo, Abreu pointed to me and told Badillo that I was going to vote against the Union, that I would vote for the Company. Mr. Badillo told me to vote for the Union, that I would get more money. Mr. Badillo walked on, but Mr. Abreu called me aside and told me privately that if I would help him to get the Union into the store, he would take care of me. Then he walked ahead and caught up with Mr. Badillo.

EMPLOYER'S EXHIBIT 7

On Thursday, the day before the election, Sonia Morales and Delia Melendez, who were working for the Union in the store, approached me and Sonia told me that the Union had told her to tell me that if I would vote "Yes" in the election the next day, the Union would pay for a round trip ticket for me to Puerto Rico and pay all my expenses for seven days. She said the Union had told her that if I voted "Yes", that would decide the election because they needed one more "Yes" vote.

On the morning of the election, Sonia again approached me and again told me to vote "Yes", and again repeated the offer that the Union told her to make to me, that if I would vote "Yes" in the election, they would pay for my round trip to Puerto Rico, including all expenses for seven days. She again said the Union told her they needed one more "Yes" vote, and that my "Yes" vote would decide the election.

The election started at 2:30 in the afternoon. Mr. Abreu, the main Union man, was in the store all the time the people were going to vote. At one point during the voting, he stood at the Information Desk, which is just at the entrance to the voting area, and spoke to Carmen Valentin and Maria Gomez as they were walking in to vote. He spoke to them for about five or ten minutes just before they voted.

Also, while employees were voting, Abreu stationed himself at the lunch counter. He met with Alfonso Marvaez and spoke to him for about 20 minutes. Immediately after Abreu spoke to Alfonso, Alfonso made the rounds of the store and spoke to at least six employees, including Toby Astacio, Lydia Matias, Sonia Velasquez, Nanette Rosario and Kaydee Feliciano. Abreu remained sitting at the lunch counter which some employees had to pass to go to the voting area and, as some girls passed by to go to vote, I heard him



tell them to vote "Yes.". Some of the girls that I heard him speak to in this manner included Grace Phillips, Evelyn Gomez and Frances Norat.

About two weeks before the election, Martha Machuca was harrassed by Delia Melendez and Sonia Moralez and Carmen Valentin who had been working for the Union in the store. They told her that if the Union won the election, Martha would be the first one out of there. Martha was crying because of these threats and I tried to comfort her.

I make this statement voluntarily, and it is true and correct to the best of my knowledge and belief.

/s/ Bernardo Martinez

Sworn to before me this

17th day of May, 1972.

/s/ Madeline Balk

Notary Public, State of New York

No. 24-5161450

Qualified in Kings County

Commission Expires March 30, 1974

STATE OF NEW YORK )

: ss:

COUNTY OF NEW YORK )

EPIFANIO V. DIAZ deposes and says:

I have been employed by the S. H. Kress Company for about 8 or 9 years. I worked at the Kress store at 1915 Third Avenue, New York City, during March and April of 1972 at the lunch counter.

During the month of March, 1972 I attended an NLRB hearing at the request of the Union. They told me they wanted me there because I was an old employee and if I was there, it would look good with the rest of the employees. Even though I had not lost any money by attending the meeting, since I went on my day off, the Union gave me \$24.00.

I make this statement voluntarily and it is true to the best of my knowledge and belief.

/s/ Epifanio V. Diaz

Sworn to before me this  
26 day of May, 1972.

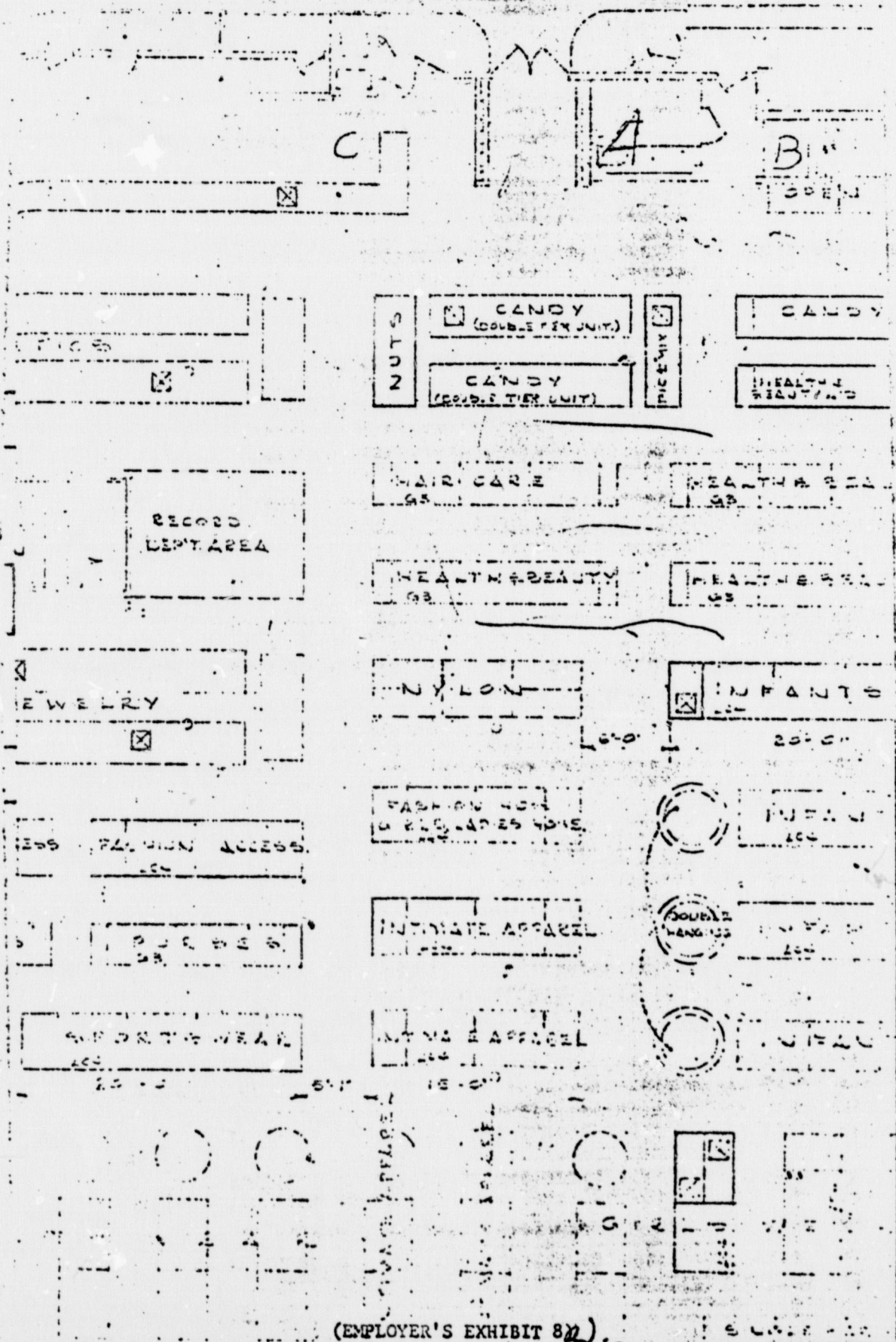
/s/ Madeline Balk

Notary Public, State of New York  
No. 24-5161450  
Qualified in Kings County  
Commission Expires March 30, 1974

EMPLOYER'S EXHIBIT 8



B SCARF  
C LUNCH COUNTER



(EMPLOYER'S EXHIBIT 82)

STATE OF NEW YORK )

: ss:

COUNTY OF NEW YORK )

HERBERT MEYER deposes and says:

I am an attorney with the law firm of Seligman & Seligman, and I represented the S. H. Kress Company at the election conducted at the Third Avenue store on May 5, 1972. I attended and participated in the pre-election conference held at the Kress store before the election on May 5, 1972.

During the pre-election conference when union representatives Abreu and Cohen were present, the Board Agent in charge of the election, inter alia, advised the parties that the area around the bottom of the stairs (in front of and around the information desk) leading to the voting place, was to be completely free of all Company supervisors and union representatives. All parties, including Abreu and Cohen, agreed.

Pursuant to the Board Agent's instructions, I instructed that all Company supervisors stay away from the above-described area during the hours of the election.

/s/ Herbert Meyer

Sworn to before me this  
26th day of May, 1972.

/s/ Madeline Balk

Notary Public, State of New York  
No. 24-5161450  
Qualified in Kings County  
Commission Expires March 30, 1974

EMPLOYER'S EXHIBIT 9



STATE OF NEW YORK )

: ss:

COUNTY OF NEW YORK )

GEORGE P. CULBERTSON deposes and says:

I am employed by S. H. Kress & Company as a Vice President. Previously, between 1964 and 1968 I was store manager at the Kress Facility located at 1915 Third Avenue, New York, New York. During the months of March, April and May, 1972, I worked a number of days in the Kress store at Third Avenue.

I was in the store on May 5, 1972, the day of the election. At one period while the voting was going on, I saw Mario Abreu, the chief official of District 65 in connection with the representation proceedings in this case, stand at the information or service desk which the employees had to pass in order to go to vote, and speak to employees as they were walking in to vote. I saw him speak to Carmen Valentin, Mary Gomez and Alfonso Narvaez as they were going in to vote. Shortly after that, I saw Abreu talking to Alfonso again. He appeared to be giving him instructions. Immediately after Abreu spoke to Alfonso, Alfonso went over and spoke to Toby Astacio. Alfonso also spoke to Lydia Matias and Lena Longo just before these people went to vote.

After the votes had been counted, I heard Mario Abreu state that he did not know what to do with all the liquor and other refreshments that he had purchased for the big victory party the Union had promised the employees.

On Wednesday before the election, after we had designated Tony Garcia as the Company observer and she had accepted, she told me that she was afraid to act as the observer because the Union employees

EMPLOYER'S EXHIBIT 10

who had found out about her designation harrassed her and made embarrassing remarks to her. I calmed her down and she agreed to act as the Company observer, but she appeared extremely nervous about this.

I have previously given an affidavit sworn to before H. E. Frost on April 4, 1972 describing the activities of Miss Haydee Feliciano and Mrs. Josie Guzman on behalf of the Union. I incorporate that affidavit herein.

I make this statement voluntarily and it is true and correct to the best of my knowledge and belief.

/s/ George P. Culbertson

Sworn to before me this  
22nd day of May, 1972.

/s/ Madeline Balk

Notary Public, State of New York  
No. 24-5161450  
Qualified in Kings County  
Commission Expires March 30, 1974



STATE OF NEW YORK )

: SS:

COUNTY OF NEW YORK )

PORFIRIO FERNANDEZ deposes and says:

I am the same Porfirio Fernandez who previously gave a statement to the Company's attorney concerning the fact that Mario Abreu, the union man, told me he was counting on me to vote for the union when I went to vote. I stated that when Mr. Abreu spoke to me at that time he was standing right by the staircase leading up to the voting area when he spoke to me at that time. His exact location was between the service desk and the stairs. I would say he was closer to the stairs. It appeared to me that he was standing there waiting for people to pass by him so he could speak to them.

Mr. Abreu had spoken to me earlier that afternoon. I had come to the store that afternoon because I was on vacation and came in to collect my pay check. When I came into the store the first time I entered from the 166th Street entrance. Mr. Abreu was standing there between the service desk and the lunch counter. When he saw me come in he called me by name and told me to vote for the union, that they are going to win and that I should not be intimidated by the Company. This was about an hour and a half before the second conversation which occurred just before I went to vote. I would say the first conversation was about 2:45 or 3 p.m. and the second conversation just before I went to vote was about 4:45 p.m.

EMPLOYER'S EXHIBIT 11

I make this statement voluntarily and it is true and correct.

/s/ Porfirio Fernandez

8/24/72

Sworn to before me

this 24th day of August, 1972

/s/ Madeline Balk

Notary Public, State of New York

No. 24-5161450

Qualified in Kings County

Commission Expires March 30, 1974



July 13, 1972

Miss Mary Taylor  
National Labor Relations Board  
Region 2  
Federal Building - Room 3614  
26 Federal Plaza  
New York, New York 10007

Re: S. H. Kress & Company  
Case No. 27-RC-15824

Dear Miss Taylor:

You have requested that I advise you whether the enclosed literature entitled "Do You Know", copy of which was furnished to you by the Union, was distributed by the Company and, if so, on what date. I have been advised by the Company that this piece of literature was distributed on April 27, 1972.

Since you advised me that the Union furnished this literature to you recently, I assume the Union is using this in an attempt to justify its last-minute misrepresentations to the employees concerning its own initiation fees and dues. If so, the Union's position is completely without merit. The Union made its last-minute misrepresentations concerning its dues and initiation fees in a leaflet distributed to employees the night before the election, at a time when the Company could not answer it and correct the misrepresentations. The fact that the Company had, more than a week before, put out a leaflet partially explaining the Union dues structure in no way mitigates the Union's conduct. In fact, under established Board precedent, it furnishes an even stronger basis for setting aside the election.

It is clear that the Union waited more than a week until the very last night before the election to make its statements concerning these vital matters. The literature was distributed in such a way and at such time that the Employer could not reply. Furthermore, the fact that the Union leaflet is replete with statements accusing the Employer of circulating falsehoods, of lying, of engaging in propaganda would vitiate the effect of any information the Company had disseminated more than a week before. Such tactics

EMPLOYER'S EXHIBIT 12

Miss Mary Taylor  
National Labor Relations Board

July 13, 1972

have been found to warrant setting aside the election. The Trane Company, 137 N. L. R. B. 1506; The Gummed Products Company, 112 N. L. R. B. 1092. In addition, these last-minute misrepresentations would tend to have an even stronger impact on the employees because they involve the Union's own dues and initiation fees. Since the Union would be the party to have special knowledge of these facts, the employees would be more likely to believe the statements made by the Union, and the Union, by misrepresenting the facts, prevented the employees from effectively evaluating this propaganda and so interfered with the election. United States Gypsum Company, 130 N. L. R. B. 901; The Cleveland Trencher Company, 130 N. L. R. B. 600; The Calidyne Company, 117 N. L. R. B. 1062. In addition, as I advised in my letters of June 12 and June 19, as well as in other material previously furnished to you, this leaflet contained other misrepresentations.

I submit that the misrepresentations contained in the leaflet distributed by the Union the night before the election, as well as the actions of the Union agents in electioneering just as the employees were going to vote, as well as the Union's tactic of using a United States Congressman and other Government officials to give the voters the impression that the Government wanted them to vote for the Union, would in and of themselves constitute grounds for setting aside the election.

Since I understand that the Union had submitted a copy of the annexed literature, I assume it has been given an opportunity to answer the Company's contentions in its objections to the election. Of course, I expect that the Company will be given the same opportunity to answer or correct any information given to you which is not in accordance with the Company's position. I submit that if this election is not set aside on the basis of the material already submitted, a hearing should be held on the Company's objections so that all issues of fact may be properly determined.

Very truly yours,

SELIGMAN & SELIGMAN

Madeline Balk



Miss Mary Taylor  
National Labor Relations Board

July 13, 1972

P.S. I am enclosing a copy of the Union constitution dated December 5, 1970, which I understand is the latest copy filed with the U.S. Department of Labor. As you will notice from the provisions of Part IV, the Union obviously misrepresented the dues, fees and other obligations of membership in its last-minute leaflet.

MB:dn  
Enclosures

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*File Copy*

NO. OF SVC.			PD. OR COLL.			CASH NO.			CHARGE TO THE ACCOUNT OF			TELEGRAM		
									Seligman & Seligman 405 Lexington Ave. NEW YORK, N. Y. 10017			<input type="checkbox"/> OVERNIGHT TELEGRAM UNLESS BOX ABOVE IS CHECKED THIS MESSAGE WILL BE SENT AS A TELEGRAM		
Send the following message, subject to the terms on back hereof, which are hereby agreed to:												October 20, 1972		
F. ROBERT VOLGER NATIONAL LABOR RELATIONS BOARD 1717 Pennsylvania Avenue, N.W. Washington, D.C.												CARE OF OR APT. NO.		
												TELEPHONE		
												ZIP CODE		
<p>S.H. KRESS &amp; CO. 2-RC-15824: EMPLOYER RESPECTFULLY REQUESTS THAT REMAND HEARING DIRECTED BY BOARD BE HELD BEFORE TRIAL EXAMINER RATHER THAN HEARING OFFICER DESIGNATED BY REGIONAL DIRECTOR. REGIONAL DIRECTOR'S PREDETERMINED CASE AGAINST EMPLOYER BY FINDING ALL ISSUES AT EMPLOYER IN SUPPLEMENTAL DECISION. -BIAS AND PREJUDICE AGAINST EMPLOYER DISPLAYED IN REGIONAL DIRECTOR'S REPORT AND DURING COURSE OF INVESTIGATION PARTICULARLY EVIDENT IN ISSUES REMANDED FOR HEARING REQUIRES IMPARTIAL THIRD PARTY FROM OUTSIDE REGION TO ENSURE FAIR HEARING. EMPLOYER FURTHER RESPECTFULLY REQUESTS RECONSIDERATION OF BOARD'S FAILURE TO EITHER REVERSE REGIONAL DIRECTOR'S DETERMINATIONS ON OBJECTIONS AND UPHOLD SUCH OBJECTIONS OR TO DIRECT HEARING ON ALL OBJECTIONS. IN OBJECTION 1, NOT ONLY DOES THE EVIDENCE ESTABLISH THAT THE UNION DELIBERATELY MISREPRESENTED ITS INITIATION FEE, DUES AND OTHER (continued)</p>														
SENDER'S TEL. NO. (212)				NAME & ADDRESS				SELIGMAN & SELIGMAN 405 Lexington Avenue, N.Y.C. 10017						
661-4700														

J 1207 (R 5-67)

**NATIONAL LABOR RELATIONS BOARD**

Serial No. \_\_\_\_\_ OFFICIAL EXHIBIT NO. **E1A**

Disposition { Identified \_\_\_\_\_  
Received ☒  
Rejected \_\_\_\_\_

In the matter of \_\_\_\_\_  
Date 12/1 Witness \_\_\_\_\_ Reporter SK  
No. Pages \_\_\_\_\_



Telegram

TO: SVC	TO: CIRCULAR	TO: CREDIT	TO: THE ACCOUNT OF	OVER NIGHT TELEGRAM UNLESS BOX ABOVE IS CHECKED THIS MESSAGE WILL BE SENT AS A TELEGRAM
Belington & Sullivan 405 Lexington Ave. New York City 10017				CARE OF OR APT. NO.
Following message, subject to the terms on back hereof, which are hereby agreed to				10/20/72
PAGE 2 (continued)				TELEPHONE
ZIP CODE				ZIP CODE

FINANCIAL OBLIGATIONS OF EMPLOYEES TO UNION BUT CERTAINLY UNION'S CONTENTION THAT UNION SECURITY PLAN IS IN ALL ITS CONTRACTS, CAN BEST BE SETTLED AT A HEARING AT WHICH RECORD EVIDENCE IS PRESENTED AND NOT BY THE UNION'S AND CLAIMS DISPUTING EMPLOYER'S EVIDENCE. ACTIVITIES OF CONGRESSMAN WELLS AND COMMISSIONER SANTAELLA IN CONJUNCTION WITH UNION OFFICIALS DISCUSSED IN OBJECTIONS 2 and 4 WARRANT THE VACATING OF THE ELECTION OR SELECTING A HEARING TO CONSIDER THE INFLAMMATORY RACIAL STATEMENTS BY WELLS WHICH WERE NOT CONSIDERED IN SUPPLEMENTAL DECISION AND EFFECT OF WELLSAN PARTICIPATION OF HIGH GOVERNMENT OFFICIALS ON EMPLOYEES' VOTE. THE EVIDENCE PROVIDED IN OBJECTIONS 3 and 6 DEMONSTRATES UNION PAID EMPLOYEES FOR APPEARANCE AS UNION SUPPORTERS TO OBTAIN OTHER EMPLOYEE SUPPORT AND MADE OTHER PROMISES OF MONEY AND VACATION TRIP TO GET A UNION JOE, ALSO PUBLICIZED PLANS FOR VICTORY PARTY MEETING BEFORE THE ELECTION ~~WELLS WERE KNOWN AND SEEN AND DURING THE EMPLOYEES' VOTE (continued)~~

SENDER'S TEL. NO. NAME & ADDRESS

Telegram

TO: SVC	TO: CIRCULAR	TO: CREDIT	TO: THE ACCOUNT OF	OVER NIGHT TELEGRAM UNLESS BOX ABOVE IS CHECKED THIS MESSAGE WILL BE SENT AS A TELEGRAM
Belington & Sullivan 405 Lexington Ave. New York City 10017				CARE OF OR APT. NO.
Following message, subject to the terms on back hereof, which are hereby agreed to				10/20/72
(Page 3 - continued)				TELEPHONE
ZIP CODE				ZIP CODE

REQUIRES EITHER THAT THESE OBJECTIONS BE UPHOLD OR THE FACTS CONCERNING THEM BE ADDUCED AT A HEARING. (COPY TO REGIONAL DIRECTOR AND UNION ATTORNEY.)

MADLINE BALK

Attorney for Employer

SENDER'S TEL. NO. NAME & ADDRESS

## EMPLOYER'S EXHIBIT 1B

P

[57134 EVDAE

144028 [13013 MSCEV412522

RAAULJHZ RUEVDEL0004 3011435-UUUU--RUEVDAE.

FM ROBERT VOLGER DEPUTY EXEC SECY WASHDC NLRB  
TO MADELINE BALK ESQ SELIGMAN AND SELIGMAN 405  
LEXINGTON AVE NEWYORK NEWYORK

BT

RE: S H KRESS AND CO 2-RC-15824. EMPLOYERS TELEGRAPHIC  
MOTION REQUESTING RECONSIDERATION OF OUR ORDER DATED  
OCT 16 1972 AND OTHER RELIEF IS DENIED AS LACKING IN  
MERIT. BY DIRECTION OF THE BOARD.

BT

NNNN

[57134 EVDAE

## [ CONFIRMATION COPY

This is a confirmation copy of a  
message Telephoned

To T.G.

On 10/27 At 12:00

General Services Administration  
Transportation & Communications  
Service, Communications Center  
FOB 26 Fedl Plaza, New York, NY  
Telephoned by M. Smith ]

---



DocId: No. \_\_\_\_\_ OFFICIAL EXEMPT NO. \_\_\_\_\_

Disposition { Identified \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

In the matter of \_\_\_\_\_

Date \_\_\_\_\_ Witness \_\_\_\_\_ Reporter \_\_\_\_\_

1973



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11. Information  
B Science  
C London County

AISLEWAY. (INSIDE STORE)

FIG. 5

STU 2

	CANDY (CO-OP TIER UNIT)	
	CANDY (CO-OP TIER UNIT)	

CANDY

HEALTHY  
BEAUTY

RECORD  
DEPT AREA

AMERICAN  
L-65

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HEALTH REPORT

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SECRET

E-2 ~~12/11/11~~  
12/11/11 ~~12/11/11~~

# DISTRICT 65 GENERAL FUND

13 ASTOR PLACE, NEW YORK, N.Y. 10003

G. 17128

84

1-12

210

DATE March 29, 1972

PAY TO THE ORDER OF Josephine Guzman

THE SUM OF                     \$ 18.00                    

DISTRICT 65 GENERAL FUND

To CHEMICAL BANK  
EIGHTH STREET AND BROADWAY  
NEW YORK, N. Y.

⑈0210⑈0012⑈084⑈003391⑈

*[Signature]*  
PRESIDENT

*[Signature]*  
SECRETARY-TREASURER

*Josephine Guzman*

E3

*12/1/72*  
*[Signature]*  
*Ed*



NATIONAL LABOR RELATIONS BOARD  
Docket No. \_\_\_\_\_ OFFICIAL EXHIBIT NO. Emp. 4State of New York  
County of New York

|            |                                     |
|------------|-------------------------------------|
| Identified | <input checked="" type="checkbox"/> |
| Received   | <input checked="" type="checkbox"/> |
| Rejected   | <input type="checkbox"/>            |

 In the matter of \_\_\_\_\_  
 Date 12-18-72 Whose Report by

 Mary Gomez, being duly  
 sworn deposes and says:

 I live at 2135 Crotona Ave  
 m.c Bronx, (I use my ~~maiden~~ married  
 name now Santiago). I have  
 worked for Kress for over 3 years  
 I am a cashier in nation.  
 I earn \$2.15 per hour.

 I went to 3 or 4 union meetings.  
 Mario Abreu was the union  
 official who spoke to us. He  
 explained what the union was for.  
 He made no promises of or  
 inducements. He did mention  
 that the union tried to get \$1.00  
 a week but could not promise  
 that we would get it. I never  
 heard him offer a trip to  
 Puerto Rico to anyone. If they  
 voted the union in Badilla  
 shook my hand when he came  
 but he didn't say anything but  
 "How do you do."

 I was off the day of the election.  
 I came to the store to vote at 2:30  
 m.c and then I left. I came up with the

first group. I saw Mario Abreu having coffee at the lunch counter. I did not see him at the service desk and he didn't speak to me. I was in a rush and left.

m.c. I see Martinez on the floor monthly. Once he signed a "void" for me. I asked him and he said he could. He helps the managers on the floor. He answers the bells. Times when he is doing stock work is upstairs.

m.c. Julie was the window trimmer in January, ~~when~~ she never used or worked as a sales lady. She did the windows, the signs, displays etc. Carlos Morales were made to display people after the union. They work on the floor selling. They work on the register as well. They had never done window trimming before.

m.c. I was told that Gould had had a stroke. When she came in to vote I could see that one arm didn't work right. She didn't look good.

m.c. And said not to touch her arm.



m. a. She didn't say anything about coming back.

I have read the above statement and swear that it is true to the  
m. a. best of my knowledge.

May Gomez  
Subscribed and sworn to before me  
this 5<sup>th</sup> day of June 1972  
Mary W Taylor  
ALCB attorney

## EMPLOYER'S EXHIBIT 6A

## VACATION ALLOWANCE - 1972

To Employees:

Vacation allowance of regular full-time employees, and regular part-time employees who work an average of at least 20 hours per week:

| <u>If you started working as<br/>regular full-time or regular<br/>part-time employee between</u> | <u>Time allowed<br/>with pay (A)</u> |
|--|--------------------------------------|
| 2-2-72 and 8-1-72  | None                                 |
| 8-2-71 and 2-1-72  | 1 week (B)                           |
| 8-2-67 and 8-1-71  | 2 weeks (B)                          |
| 1-1-53 and 8-1-67  | 3 weeks                              |
| 12-31-52 or before   | 4 weeks                              |

(A) Vacation pay shall be based on the employee's wage rate for the average hours worked per week.

(B) Can be taken only after completion of six months' employment.

To provide better service to customers and insure a more orderly flow of work in the stores, vacation may be taken anytime during the year. When scheduling your vacation, avoid peak selling seasons such as Christmas, Easter, School Opening, etc.

If a holiday occurs during an employee's vacation and the store is closed, an additional day with pay is to be added to the employee's vacation. Instead of returning to work on a Monday, the employee would return on a Tuesday after a vacation in which a holiday occurs.



## EMPLOYER'S EXHIBIT 6A (Cont'd)

The employee and Store Manager are jointly responsible for all vacations being taken on a "time off with pay" basis. Wages in lieu of vacation are not permitted.

Manpower Division  
January 3, 1972

---

S. H. KRESS AND COMPANY  
VACATION RECORD - 1972

NAME \_\_\_\_\_

DATE EMPLOYED PART-TIME \_\_\_\_\_ FULL-TIME \_\_\_\_\_ VACATION ALLOWANCE \_\_\_\_\_ WEEKS

YOUR VACATION ALLOWANCE, WHICH IS ENTERED ABOVE, HAS BEEN DETERMINED IN ACCORDANCE WITH THE VACATION ALLOWANCE - 1972 NOTICE.

DRAW PENCIL LINES IN COLUMNS AT BOTTOM OF THE SHEET TO DESIGNATE WEEKS YOU DESIRE TO TAKE VACATION. AVOID PEAK SELLING SEASONS SUCH AS CHRISTMAS, EASTER, SCHOOL OPENING, ETC.

VACATIONS CANNOT BE ACCUMULATED.

YOUR REQUEST WILL BE CAREFULLY CONSIDERED AND, IF POSSIBLE, THE TIME ASKED FOR WILL BE ALLOWED. YOU WILL BE ADVISED WHETHER OR NOT THE VACATION REQUESTED IS APPROVED. IF THE VACATIONS OF TWO OR MORE EMPLOYEES DOING THE SAME OR RELATED WORK CONFLICT, THE REQUESTS OF THE EMPLOYEES WITH THE LONGEST EMPLOYMENT WILL BE GIVEN PRECEDENCE.

| JANUARY       |                 |                 |                 | FEBRUARY       |                |                 |                 | MARCH          |                |                 |                 |                | APRIL         |                 |                 |                 | MAY           |                |                 |                 |                | JUNF           |                 |                 |                |
|---------------|-----------------|-----------------|-----------------|----------------|----------------|-----------------|-----------------|----------------|----------------|-----------------|-----------------|----------------|---------------|-----------------|-----------------|-----------------|---------------|----------------|-----------------|-----------------|----------------|----------------|-----------------|-----------------|----------------|
| $\frac{9}{8}$ | $\frac{10}{15}$ | $\frac{17}{22}$ | $\frac{24}{29}$ | $\frac{31}{5}$ | $\frac{7}{12}$ | $\frac{14}{19}$ | $\frac{21}{26}$ | $\frac{28}{4}$ | $\frac{6}{11}$ | $\frac{13}{18}$ | $\frac{20}{25}$ | $\frac{27}{1}$ | $\frac{3}{8}$ | $\frac{10}{15}$ | $\frac{17}{22}$ | $\frac{24}{29}$ | $\frac{1}{6}$ | $\frac{8}{13}$ | $\frac{15}{20}$ | $\frac{22}{27}$ | $\frac{29}{3}$ | $\frac{5}{10}$ | $\frac{12}{17}$ | $\frac{19}{24}$ | $\frac{26}{1}$ |
|               |                 |                 |                 |                |                |                 |                 |                |                |                 |                 |                |               |                 |                 |                 |               |                |                 |                 |                |                |                 |                 |                |

| JULY   |          |          |          | AUGUST  |         |          |          | SEPTEMBER |        |          |          | OCTOBER  |        |         |          | NOVEMBER |         |         |          | DECEMBER |         |        |          |          |          |
|--------|----------|----------|----------|---------|---------|----------|----------|-----------|--------|----------|----------|----------|--------|---------|----------|----------|---------|---------|----------|----------|---------|--------|----------|----------|----------|
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|        |          |          |          |         |         |          |          |           |        |          |          |          |        |         |          |          |         |         |          |          |         |        |          |          |          |

SIGNATURE OF EMPLOYEE \_\_\_\_\_

NATIONAL LABOR RELATIONS BOARD

HAND THIS SHEET IN AT OFFICE WITHIN ONE WEEK. Check No. \_\_\_\_\_ OFFICIAL COMMENT BY Emp 613

Disposition

Handled ☒  
Invest ☒  
Referred \_\_\_\_\_

9665 (1-72) 1M MANPOWER

In the office of \_\_\_\_\_

Date 12-4-72Signature [Signature]

See Page \_\_\_\_\_



STATE OF NEW YORK } SS  
COUNTY OF NEW YORK }

P-2

12/10/72

R. [Signature]

6/7/72

Corfio Fernandez, bajo juramento  
declara lo siguiente:

El día en que se celebraron las  
elecciones, y durante las horas de  
votar Mario Abreo estaba en todas  
partes de la tienda.

Cuando yo iba a votar, Mario  
estaba enfrente de la escalera abajo,  
en el piso primero. No sé por  
cuanto tiempo estaba allí. No estaba  
allí cuando bajé, estaba el "lunch  
counter" hablando a unos empleados.  
No sé de que hablaban ellos.

Antes de votar, Mario me habló.  
Me dijo que debo votar por la unión.  
No me habló con violencia. Delante  
de mí no mencionó amenazas. No  
sé si él lo hizo a otros empleados, pero  
a mí, no.

Lunes, el cinco de junio, 1972 yo hablé  
a Mrs. Back en la oficina de la compañía.  
Ella pidió que yo fuera a la oficina.  
Una empleada, Dolores, sirvió de intérprete.  
Me preguntó de este asunto antedicho de  
Mario.

NATIONAL LABOR RELATIONS BOARD  
OFFICIAL REPORT  
12/10/72

In referencia al testimonio que  
tiene la Señora Back, Mario Abreo  
no me paró cuando iba a votar.

Yo no puedo hablar ni leer  
inglés. Yo firmé un documento, no  
éste, pero no entendí lo que firmé.

Yo he leído esta declaración de  
dos páginas y es verdad lo mejor  
que recuerdo.

*[Signature]*

Sworn to before me  
this 7th day of June, 1972

Robert A. Reisinger  
agent



STATE OF NEW YORK     )  
                                       )    ss:  
 COUNTY OF NEW YORK    )

6/7/72

PORFIRIO FERNANDEZ, under oath, declares the following:

On the day of the election and during voting time, Mario Abreo was everywhere in the shop.

As I was going to the voting place, Mario was in front of the staircase downstairs, on the first floor. I do not know how long he was there, he was not there when I came down, he was at the "lunch counter" talking to some employees. I do not know what they were talking about.

Before I voted Mario spoke to me. He told me that I had to vote for the union. He did not talk to me violently. In my presence he did not mention any threats. I do not know whether he threatened any other employee, not me, no.

Monday, June 5, 1972, I spoke to Mrs. Back in the office of the company. She asked me to go to the office. An employee, Dolores, served as interpreter. She asked me questions related to the above Mario matter.

Regarding the affidavit that Mrs. Back has, Mario Abreo did not stop me as I was going to vote.

I do not speak nor read English. I signed a document, not this one, but I did not understand what I signed.

I have read this affidavit consisting of two pages and it is true to the best of my recollection.

signed) (illegible)

Sworn to before me this  
 7th day of June, 1972.

Robert Reicinger  
 Agent

## PETITIONER'S EXHIBIT 5a

February 29, 1972

Dear Fellow Employee:

Though most of you have known me for a short time, I hope that you can have faith and confidence in my desire to tell you only the truth.

Some outsiders who call themselves union organizers (they are really out to see how much they can TAKE out of your pay) claim that they have been able to talk some of you into giving up part of your pay.

It is very easy for these money collectors to talk out of both sides of their mouths because talk is cheap.

The union will "promise" anything -- but **DON'T BE MISLED** -- demand that the union answer these questions **IN WRITING**:

1. Exactly what can the union guarantee?
2. If your store becomes unionized, will the union fine you if you don't pay your dues?
3. If you don't pay your dues in a union shop can you lose your job?
4. How much dues does this union expect to take out of your pay every month?
5. Is this union a "strike happy" union that will pull you out on strike at the drop of a hat?
6. If this union pulls you out on strike, do you get any unemployment compensation for the first seven weeks of the strike?
7. If this union pulls you out on strike, how will you support yourself and your family?
8. If the union pulls you out on an economic strike, can you be replaced? If you are replaced, can you lose your job?



For your own protection, you should know the answers to these questions. **DEMAND THAT THE UNION PUT THE ANSWERS IN WRITING AND SIGN THEM.** I am sure that the union will give you a lot of double talk, but remember, **IT IS YOUR MONEY THEY ARE AFTER!**

I know that you are people of good sound judgment and that once you know the truth you will keep these outsiders away from your pay. If you have any question -- any question at all -- please give me a chance to tell you the truth.

Sincerely,

/s/ J. W. Williams

---

## PETITIONER'S EXHIBIT 5b

DO YOU KNOW?BETWEEN 1967 AND 1970 DISTRICT 65  
COLLECTED FROM ITS MEMBERS:

|              |           |           |
|--------------|-----------|-----------|
| FINES:       | MORE THAN | \$300,000 |
| FEES:        | MORE THAN | 500,000   |
| ASSESSMENTS: | MORE THAN | 15,000    |

---

BETWEEN 1967 AND 1970 THE UNION MADE PAYMENTS TO ITS OFFICERS AND OTHER EMPLOYEES -- INCLUDING ORGANIZERS - OF MORE THAN FOUR MILLION DOLLARS.

IS THIS WHAT YOU WANT?

The law says that an employee can be discharged in a union shop for non-payment of union dues, so here is what District 65 did to make sure of its hold on your wages. It calls everything "dues". The Union Constitution provides:

"All Initiation fees, assessments, fines, or other obligations owing by any member to the UNION shall be merged with the and become part of the dues owing by that member".

Thus, even though you pay your weekly dues, if you don't pay a \$50.00 assessment or a fine of \$200.00, \$300.00, or more, -- THE UNION WILL GET YOU FIRED.

IF THIS IS NOT WHAT YOU WANT  
VOTE "NO" -- SAVE DOUGH



## PETITIONER'S EXHIBIT 5b (Continued)

HERE'S WHAT IT WILL COST YOU TO  
BELONG TO THE UNION

1. Dues: \$5.25 per month, if you earn \$81.00 per week.  
If you earn more you pay more. Thus, if your salary is \$85.00 you pay \$5.55 and you pay monthly dues of \$6.20 if you earn \$95.00. Even if you are not working, you must pay dues of \$1.00 a month!
2. Initiation Fee: \$20.00
3. Reinstatement Fee: \$20.00
4. Fines & Strike Assessments: No limit

VOTE "NO" ON ELECTION DAYS. H. KRESS and Company

---

## PETITIONER'S EXHIBIT 5c

¿ SABE USTED?ENTRE 1967 Y 1970 EL DISTRITO 65  
COLECTÓ DE SUS MIEMBROS:

|               |        |           |
|---------------|--------|-----------|
| MULTAS:       | MAS DE | \$300,000 |
| HONORARIOS:   | MAS DE | 500,000   |
| IMPOSICIONES: | MAS DE | 15,000    |

-----

ENTRE 1967 Y 1970 LA UNIÓN HIZO PAGARES A SUS OFICIALES Y OTROS EMPLEADOS - INCLUYENDO LOS ORGANIZADORES - DE MAS DE CUATRO MILLONES DE DOLARES.

¿ FSTO ES LO QUE USTED QUIERE?

La ley dice que un empleado puede ser descargado en un negocio unionista si no paga los derechos impue sto por la unión, y aqui es lo que el Distrito 65 Hizo para asegurar su agarra en su sueldo. La unión le pone a todo el nombre de "derechos". La Constitución del Distrito 65 provee:

"Todos los Honorarios de iniciación, imposiciones, multas, u otras obligaciones ser debidas por cualquier miembro a la UNIÓN serán fundidos con, y llegaran a ser parte, de los derechos debidos por ese miembro".

Y asi, aunque usted pague derechos semanalmente, si usted no pague una imposición de \$50.00 o una multa de \$200.00, \$300.00 or mos, -- LA UNIÓN HARA SEGURO QUE USTED PIERDA SU TRABAJO.



## PETITIONER'S EXHIBIT 5c (Continued)

SI NO QUIERE ESTOVOTE "NO" -- AHORRE DINEROESTO ES LO QUE COSTARA PARA PERTENECER  
A LA UNION

1. Derechos: \$5.25 mensual, si gana \$81.00 a la semana. Si gana mas paga mas. Y asi, si su salario es \$85.00 a la semana usted paga \$5.55 y usted paga derechos de \$6.20 si gana \$95.00. Aunque usted no este tr abajando, tiene que pagar derechos de 1.00 al mes.
2. Honorario de iniciación: \$20.00
3. Honorario de restablicimiento: \$20.00
4. Multas e imposiciones de huelgas: No hay limite

EN EL DIA DE ELECCION VOTE "NO"S. H. KRESS and Compañia

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## PETITIONER'S EXHIBIT 5d

THE GRASS ALWAYS LOOKS GREENER ON THE OTHER SIDE  
OF THE STREET

You are being told by the union that they will cure all of your ills. We have heard rumors of some fantastic promises. Don't be mislead. If a union comes in at Kress, the union officials will be made up of those persons now active in behalf of the union. You know who they are. Do you want to put your future in the hands of these individuals?

Every organization makes mistakes. Kress is no exception. The basic question for you to decide is whether the Company and the employees can work out problems better with, or without, the union. In the past, we have been able to work out the problems together, and there is no reason we cannot do this in the future.

The union will tell you what you want to hear, and make all kinds of PROMISES so they can get money out of you. WE ALL WORK HARD FOR OUR MONEY -- DON'T GIVE IT AWAY FOR EMPTY PROMISES . . . . . CONSIDER THIS: Will the union stay around here and represent you after they have gotten your money from you?

Yes, the grass always looks greener on the other side of the street. It is always easier to point out other people's mistakes, but, when you are there, you find the grass is no greener than at home. We have no problems here that we cannot work out ourselves. In the coming election, we earnestly urge you to vote. We do not believe we need a union at Kress.

Remember, even if you have signed a union card, you can  
vote NO!

S. H. KRESS AND COMPANY

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## PETITIONER'S EXHIBIT 5e

FACTS AND FICTION

ONCE AGAIN THE UNION IS PLAYING ITS OLD GAME OF "IF AT FIRST YOU DON'T SUCCEED, LIE, LIE AGAIN. " HERE ARE JUST SOME OF THE WAYS THE UNION HAS PROBABLY TRIED TO DECEIVE YOU:

---

FICTION: THE UNION SAYS THAT IF THE UNION GETS IN, "YOU WILL GET WAGE INCREASES AND MORE FRINGE BENEFITS."

FACT: THE UNION CAN GUARANTEE YOU ABSOLUTELY NOTHING AND THE UNION KNOWS IT. IF THE UNION GETS INTO YOUR STORE, THE LAW ONLY REQUIRES THAT THE COMPANY BARGAIN, IT MAKES NO GUARANTEES AS TO WHAT WOULD COME OUT OF THE BARGAINING. AS A MATTER OF FACT, IF THE UNION GETS INTO YOUR STORE AND ECONOMIC CONDITIONS REQUIRE YOUR COMPANY TO CONSIDER DISCONTINUING SOME OF YOUR BENEFITS, THE UNION WOULD BE FORCED BY LAW TO BARGAIN ABOUT DISCONTINUING THOSE BENEFITS.

---

FICTION: THE UNION FALSELY IMPLIES THAT IF A UNION GETS INTO A STORE THAT STORE CAN NEVER BE CLOSED DOWN. THIS IS ANOTHER DELIBERATE UNION LIE!

FACT: A STORE CAN BE CLOSED FOR ECONOMIC REASONS AT ANY TIME -- REGARDLESS OF THE

UNION. AS A MATTER OF FACT, THIS UNION HAS FIRST-HAND KNOWLEDGE THAT MANY STORES WHERE IT HAD UNION CONTRACTS HAVE GONE OUT OF BUSINESS. REMEMBER THIS, TOO: IF THE UNION CALLS AN ECONOMIC STRIKE WHICH MAKES IT IMPOSSIBLE FOR A COMPANY TO OPERATE, THE COMPANY CAN MOVE ITS PRODUCTION ELSEWHERE OR CLOSE THE STORE DOWN COMPLETELY.

FICTION:

THE UNION SAYS "IF YOU DO NOT SIGN A UNION CARD YOU CAN NOT VOTE IN THE ELECTION."

FACT:

THE LAW SAYS NO SUCH THING. WHETHER YOU HAVE SIGNED A CARD OR NOT, YOU WILL BE ABLE TO VOTE. AND EVEN IF YOU HAVE SIGNED A CARD YOU MAY VOTE FOR THE COMPANY. THE ELECTION WILL BE RUN BY THE GOVERNMENT AND WILL BE BY SECRET BALLOT. NO ONE WILL KNOW HOW YOU VOTED.

BE SURE TO LOOK FOR FACTS -- NOT WILD STORIES. EACH OF YOU MUST THINK AND DECIDE FOR YOURSELF WHETHER OR NOT YOU WANT THIS UNION, WHICH IS ONLY TRYING TO TRICK YOU TO TAKE YOUR MONEY IN DUES AND ASSESSMENTS AND TELL YOU WHAT TO DO.

S. H. KRESS & COMPANY

VOTE RIGHT  
AVOID STRIKES

NO





VERDAD Y FICCIÓN

ALGUNAS DE LAS MANERAS QUE LA UNIÓN HA TRATADO DE ENGAÑARLOS:

FICCIÓN: LA UNIÓN DICE QUE SI SE METE EN LA TIENDA, "UDS. RECIBIRAN AUMENTOS EN SALARIOS Y MAS BENEFICIOS."

VERDAD: LA UNIÓN LE PUEDE GARANTIZAR ABSOLUTAMENTE NADA Y LO SABE. SI LA UNIÓN SE METE EN SU TIENDA, LA LEY SOLAMENTE EXIGE QUE LA COMPAÑIA CONTRATE, NO GARANTIZA LO QUE RESULTE DEL CONTRATO. LA VERDAD ES, QUE SI LA UNIÓN SE METE EN SU TIENDA Y CONDICIONES ECONÓMICAS DEMANDAN QUE SU COMPAÑIA CONSIDERE LA DISCONTINUACIÓN DE ALGUNOS DE SUS BENEFICIOS, LA UNIÓN SERIA OBLIGADA POR LA LEY A CONTRATAR ACERCA DE LA DISCONTINUACIÓN DE ESOS BENEFICIOS.

FICCIÓN: LA UNIÓN FALSAMENTE DA A ENTENDER QUE SI UNA UNIÓN SE METE A UNA TIENDA QUE ESA TIENDA NUNCA SE PUEDE CERRAR. ESTA ES OTRA MENTIRA PREMEDITADA POR LA UNIÓN.

VERDAD: LA TIENDA PUEDE SER CERRADA POR RAZONES ECONÓMICAS A CUALQUIER TIEMPO -- DESCUIDADO DE LA UNIÓN. LA VERDAD ES QUE ESTA UNIÓN TIENE INTIMO CONOCIMIENTO QUE MUCHAS TIENDAS EN DONDE TENIA CONTRATOS SE HAN CERRADO. RECUERDE ESTO, TAMBIEN: SI LA UNIÓN DECLARA UNA HUELGA LO HACE IMPOSIBLE PARA LA COMPAÑIA PARA OPERAR, LA COMPAÑIA PUEDE MUDAR SU PRODUCCIÓN A OTRO SITIO O PUEDE CERRAR LA TIENDA COMPLETAMENTE.

FICCIÓN: LA UNIÓN DICE QUE, "SI USTED NO FIRMA UNA TARJETA CON LA UNIÓN NO PUEDE VOTAR EL DIA DE LA ELECCIÓN."

VERDAD: LA LEY NO DICE ESO. NO IMPORTA SI USTED NO HA FIRMADO UNA TARJETA, PUEDE VOTAR. Y SI USTED HA FIRMADO UNA TARJETA PUEDE VOTAR CON LA COMPAÑIA. LA ELECCIÓN SERA DIRIGIDA POR EL GOBIERNO Y SU VOTO SERA HECHO EN SECRETO. NADIE SABRA COMO USTED VOTO.

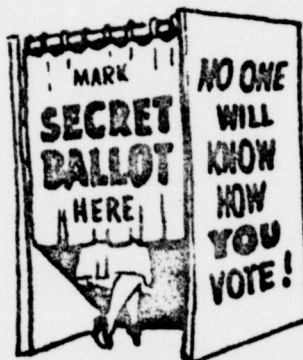
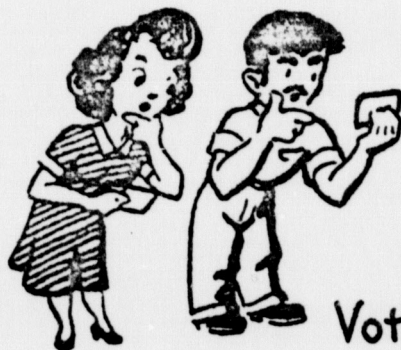
ESTE SEGURO QUE HAYE LOS HECHOS. CADA UNO TIENE QUE PENSAR Y DECIDIR SI QUIERE QUE LA UNIÓN SE META EN SU TIENDA. LA UNIÓN LE ESTA ENGAÑANDO PARA COGER SU DINERO EN LA FORMA DE DERECHOS E IMPOSICIONES Y DECIRLES LO QUE TIENEN QUE HACER.

S. H. KRESS & COMPANY

VOTE NO!!      EVITEN HUELGAS

NO  
VOTE ☒

# IT'S NOT TOO LATE!



Even if you have  
been pressured into  
signing a union card—  
You are Free to

Vote "NO" at the SECRET Election.

## It Is Simple To Vote!

You just mark an X in the box under NO  
nothing else — that is all!!

### Be Sure To Mark An X In The Box Marked NO

Do not sign your name or don't mark the ballot any other way!!

Do you wish to be represented for purposes of collective bargaining by—

DISTRICT 65  
DISTRIBUTIVE WORKERS OF AMERICA

|                                 |   |
|---------------------------------|---|
| YES<br><input type="checkbox"/> | NO<br><input checked="" type="checkbox"/> |
|---------------------------------|---|

# VOTE NO

## Your Failure To Vote Is A Vote For The Union And Its Dues, Fines And Assessments

S. H. KRESS & CO.

NATIONAL LABOR RELATIONS BOARD  
SECRET NO.



# NO ES MUY TARDE!



Si aún ha Firmado  
una tarjeta bajo  
presion--

Tiene Libertad para  
Votar "NO" en la Elección SECRETA.

## ¡Es Fácil Para Votar!

*Usted solamente marca una X en la cajita bajo de NO*  
nada mas — eso es todo!

### Este Seguro Que Escriba Una X En La Cajita Marcada NO

No firme su nombre y no haga nada mas con la balota!

|   |    |
|---|----|
| ¿Quiere ser representado por propósitos de tratos colectivos por el — |    |
| DISTRITO 65   |    |
| TRABAJEROS DE DISTRIBUCION DE LA AMERICA?                             |    |
| SI  | NO |
|   | X  |

**VOTE  
NO**

**Su Fracaso De Votar Es Un Voto Para La Unión  
Y Sus Derechos, Multas E Imposiciones**

S. H. KRESS & CO.

Make Your Own  
**GUARANTEE**  
When You Vote

**NO**  
X

It Means  
**NO**

Dues, Fines and Assessments,  
Strikes,  
Lost Pay Due to the Strikes,  
Picket Lines,  
Violence,  
Forced Attendance at Union  
Meetings,  
Union Dictatorship.

**This  
Is  
What  
The  
Union  
Can  
Guarantee  
You...**

Is the spirit  
of the  
No. Page

Check list

NATIONAL LABOR RELATIONS  
BOARD REPORT NO. 1

SG



# The True Story What a Union IS -- & IS NOT!

NATIONAL  
Booklet No. \_\_\_\_\_

IS BOARD  
P-5H

In the office  
Date 12/18/77  
No. Pages \_\_\_\_\_

Register

It's Important that Everyone  
Understands Exactly What a  
Union Can and Cannot Do--  
by Law.



## WHAT A UNION IS .....

A Union IS an organization that makes a lot of phony promises.

A Union IS something that you pay a lot of money to.

A Union IS run by people who live off your earnings.

A Union IS more interested in Union Bosses than you.

A Union IS run by Union Bosses that have control over you.

A Union IS capable of calling you out on strike and making you walk a picket line.

A Union IS liable to turn your friends against you.

A Union IS a big business for Union Bosses.

A Union IS a group that needs you to replace its lost members.

A Union IS afraid to back up its promises by a written guarantee.

A Union IS often guilty of breaking promises and mistreating members.

A Union IS something that involves everyone — once in, its hard to get out.

**NO**

**Vote ☒ On Election Day!**



## ..... WHAT A UNION IS NOT

- A Union IS NOT going to keep this plant open.
- A Union IS NOT going to sell our products.
- A Union IS NOT going to provide business to run this plant.
- A Union IS NOT going to provide you with a job.
- A Union IS NOT going to pay your paycheck.
- A Union IS NOT going to pay for any of your benefits.
- A Union IS NOT going to pay your medical or hospital insurance.
- A Union IS NOT going to pay for your vacations and holidays.
- A Union IS NOT interested in you—only in collecting money from you.
- A Union IS NOT going to provide the supplies and equipment to keep your plant running.
- A Union IS NOT responsible for carrying out the false promises it makes you.
- A Union IS NOT interested in you or your personal problems.

— BUT YOUR COMPANY is and that's why we can and will furnish you factual proof of everything we have said above.

You see, there's a lot more to this Union thing than what the Union would have you believe. Simply by voting a union into a plant means absolutely nothing — a Union cannot itself do one single thing about your job or pay — the only thing the Union can do is to ask the Company — and if it is not reasonable to the Company and the Company says "NO" then there is nothing for the Union to do but call a strike.

Please Turn the Page



**REMEMBER -**

**A**

**NO**

**VOTE MEANS**

**NO UNION**

**NO WAGES LOST DUE To Strikes**

**NO DUES**

**NO STRIKES**

**NO FINES**

**NO ASSESSMENTS**

**NO UNION BOSSES**

**VOTE NO!**

**S. H. KRESS and Company**



# STRIKES

HERE IS A PARTIAL LIST OF STRIKES RECENTLY CALLED BY DISTRICT 65:

|                             |                                 |                                 |
|-----------------------------|---------------------------------|---------------------------------|
| Eckhouse Shoe Co.           | Kaminow Brow, Inc.              | Abraham's Magazine Service      |
| Uncle Sam Chemical Co.      | Lambert Frame & Picture Co.     | American Bakery                 |
| Union Stationery Corp.      | Lerman Bros., Inc.              | Air Works                       |
| Trade Imports, Inc.         | Miles Shoes, Inc.               | Ideal Laundry                   |
| Flora Clock Co., Inc.       | National Shoe Stores            | Chick and Que                   |
| Telemet Co.                 | Standard Sample, Inc.           | British Ind.-Avnet Electronics  |
| Murray Textile Co.          | Zelart Drug Co., Inc. & Fel Co. | New York University             |
| Paul A. Straub & Co.        | Arco Tools, Inc.                | Accurate List Letter Service    |
| Leather Coating Corp.       | Paramount Surgical Supply Co.   | H.J. Stotter Co.                |
| Transoceanic Baling Corp.   | Universal Packaging Products    | Kores Mfg. Co.                  |
| E & H Simon, Inc.           | Air Express International       | Morris Abrams, Inc.             |
| Acme News Co., Inc.         | Meburt Products Cooperative     | Wade Co.                        |
| Aetna Painting Co., Inc.    | Monroe Sander Corp.             | Benkey Jewelry Co., Inc.        |
| Elar Contracting Corp.      | Title Guarantee Co.             | Rosana Knit-Warnaco Corp.       |
| Bradley-Time                | Greenman Bros.                  | Action Letter, Inc.             |
| Snafu Offset Printers Co.   | National Birth Record Co.       | M. Luxemburg & Sons             |
| ABC Sample Card Co.         | H. Greenwald Corp.              | Tiger Things                    |
| Castro Convertible Corp.    | Master Touch Rental Lab.        | Williams Lumber Co.             |
| Cosmetic Mfg. Corp.         | H-G Toys                        | Little Fawn                     |
| Defender Industries, Inc.   | Midtown Mfg. Corp.              | Century Oxford Mfg. Corp.       |
| Prestype, Inc.              | General Envelope Co., Inc.      | Simplicity Pattern Co., Inc.    |
| Vita Food Products          | May Tag & Label Co.             | Ladies & Children's App. Mfgs.  |
| A. Milner Co., Inc.         | Fineline Thermographers         | Elizabeth Hartley, Inc.         |
| Ace Drop Cloth Mfg. Co.     | Atlantic Foam Prod. Corp.       | Art Steel Co.                   |
| Glass Labs, Inc.            | Modern Classics, Inc.           | Jefferson Stores                |
| Royal Worcester             | Franco-American Novelties       | Electronic Reproduction Service |
| Manhattan Direct Mail, Inc. | Ronson Service, Inc.            | Assn. Ladies & Children's Hats  |
| Alarm Device Mfg. Co.       | Louis Obici Memorial Hospital   | Museum of Modern Art            |
| Jay-Willfred Co., Inc.      | City of Charleston              | Mid-South Milling Co.           |
|                             | Lyons & Co.                     | Fisk University                 |

(Over)

- NO UNION
- NO UNION STRIKES
- NO UNION DUES
- NO UNION PICKET LINES
- NO UNION FINES
- NO UNION ASSESSMENTS
- NO UNION COMMANDS

**VOTE NO**  
**NO STRIKE**

**S. H. KRESS and Company**

NATIONAL LABOR RELATIONS BOARD  
 District No. \_\_\_\_\_ SPECIAL AGENT IN CHARGE  
 Division \_\_\_\_\_  
 Date \_\_\_\_\_  
 To the Office of \_\_\_\_\_  
 By \_\_\_\_\_  
 Special Agent in Charge



[Dated 12/27/72]

**SPECIAL APPEAL BY THE EMPLOYER FROM HEARING  
OFFICER'S DENIAL OF EMPLOYER'S REQUEST TO  
FILE BRIEF AT CLOSE OF HEARING**

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The Employer respectfully requests special permission to appeal to the Board from the Hearing Officer's refusal to permit the Employer to file a brief after the close of the hearing on objections and challenges.

This matter involved such substantial issues of fact and law that the Board granted the Employer's request for review of the Regional Director's Supplemental Decision, and directed that a hearing be held to resolve the issues raised as to certain objections and challenges.

A brief is particularly essential at this stage of the proceeding. This hearing consumed five full days and the record will be close to 1,000 pages. The evidence at the hearing covered a broad range of both legal and evidentiary issues. Such important, unique and difficult questions of law were involved that, during the course of the hearing, the Hearing Officer had to call a recess to examine into some of the questions of law that were raised. Delicate and essential credibility resolutions are involved.

The Hearing Officer's action is particularly prejudicial to the Employer since he did not advise the Employer until the last moment just before the close of the hearing, that he would not permit briefs to be filed. Accordingly, throughout the hearing, in anticipation of having the opportunity to set forth its position on the facts and the law in a brief, the Employer did not expound its position to the extent warranted by the difficult questions of law and fact involved.

The asserted reason of the Hearing Officer in taking this action was that if the Board had wanted to give the parties the right to file briefs with the Hearing Officer, it would have stated so specifically in its order directing the hearing. It is submitted that such reasoning is without basis. The remand order which was contained in a telegram by Robert Volger, Deputy Executive Secretary, dated October 16, 1972, provides, in pertinent part:

"The Board concluded that the issues raised as to these matters can best be resolved by a hearing. Accordingly, the case is remanded to the Regional Director for such hearing and for further action in accord with the Board's Rules and Regulations."

Nothing in the remand order precludes the right of the parties to file a brief to the Hearing Officer. Indeed, the Board's Rules and Regulations, Section 102.69(c) and Section 102.67 which govern this proceeding would indicate that the Employer does have a right to file a brief to the Hearing Officer.\*

The failure of the Hearing Officer to permit the Employer to file a brief which would call his attention to the salient evidence and clarify the issues involved could well result in erroneous findings, conclusions, recommendations and credibility resolutions at this stage of the proceeding which would seriously prejudice the Employer.

\* Section 102.69(c) which deals with election objections proceedings provides that: " \*\*\* The parties shall have the rights set forth in Section 102.67(a) \*\*\*" Section 102.67 states that: "Any party desiring to submit a brief to the Regional Director shall file the original and one copy thereof, which may be a typed carbon copy, within seven (7) days after the close of the hearing; provided, however, that prior to the close of the hearing and for good cause, the Hearing Officer may grant an extension of time not to exceed an additional 14 days."



Accordingly, it is respectfully requested that before any report is issued in this proceeding, the Employer's request for permission to file a brief to the Hearing Officer should be granted and that the Employer be granted 21 days from the date the Board issues its order to file said brief.

Respectfully submitted,  
SELIGMAN & SELIGMAN

By /s/ Madeline Balk  
Attorneys for Employer  
405 Lexington Avenue  
New York, New York 10017

(212) 661-4700

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NLRB  
ORDER SECTION  
HFL/dn

1/11/73 - 3:00  
49325

NLRB Region 2  
New York, New York

Madeline Balk, Esq.  
Seligman & Seligman  
405 Lexington Avenue  
New York, New York

RE: S. H. KRESS & COMPANY, CASE 2-RC-15824. EMPLOYER'S  
SPECIAL APPEAL FROM HEARING OFFICER'S DENIAL OF EM-  
PLOYER'S REQUEST TO FILE BRIEF AT CLOSE OF HEARING IS  
HEREBY DENIED. BY DIRECTION OF THE BOARD: MEMBER  
KENNEDY DISSENTING.

HOWARD F. LEBARON  
ASSOCIATE EXECUTIVE SECRETARY

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[Dated 10/17/73]

Case 2-CA-13057

**RESPONSE TO NOTICE TO SHOW CAUSE**

Now comes S. H. Kress and Company, Respondent in the above matter and in response to the Order to Show Cause issued in the above-entitled proceeding by George A. Leet, Associate Executive Secretary, on October 4, 1973, opposes the General Counsel's Motion for Summary Judgment for the following reasons:

**I. THE MOTION TO STRIKE PORTIONS  
OF RESPONDENT'S ANSWER**

1. In the Motion for Summary Judgment the General Counsel recites that the Motion is based in part on certain alleged exhibits attached to a verified petition of Counsel for the General Counsel. No exhibits were attached to the motion papers served on attorneys for Respondent and the petition of Counsel for General Counsel was unverified. Failure to serve on opposing counsel correct and complete copies of all papers filed with the Board on which the General Counsel relies in support of his motion clearly deprives Respondent of due process and that elemental fairness which administrative agencies are required to observe in these proceedings.

2. In denying the appropriateness of the unit alleged in paragraph 5 of the Complaint, Respondent seeks to obtain a review of the action overruling Respondent's challenges to the ballots of Maria Aviles and Soniz Morales who are display department personnel. The unit alleged in paragraph 5 of the complaint specifically excludes "all display employees." Therefore, if this unit is appropriate, as the General Counsel alleges, then Respondent's challenges to the ballots of the display department employees, Aviles and Morales, should have been upheld and their votes should not have been counted.

Clearly, this procedure, which is the only way Respondent can preserve its defenses in order to obtain review of the erroneous determinations on the challenges, is not frivolous. Moreover, the General Counsel's motion to dismiss this denial as frivolous is defective in that, inter alia, he relies in support of this motion on exhibits which were not served on Respondent.

3. The General Counsel's motion to strike portions of Respondent's answer on the grounds that Respondent is seeking to relitigate issues previously decided in a prior related representation proceeding, 2-RC-15824, must be denied as being without merit. Respondent is entitled in this proceeding to contest the Board's action in the prior representation proceeding and to contest the Certification of Representative.

4. In any case, the denials and defenses set forth in Respondent's answer are not only permitted by Sections 9 and 10 of the Act, but, in fact, are required by Section 10(e) of the Act, in order to preserve Respondent's right to judicial review of the Board's action in the representation proceeding.

5. There is no matter contained in Respondent's answer which is "frivolous" within the meaning of either the Board's Rules and Regulations or the Federal Rules of Civil Procedure.

6. The General Counsel's motion to strike portions of Respondent's answer as "frivolous" is not appropriate under Rule 12(f) of the Federal Rules of Civil Procedure.

7. The General Counsel's motion to strike portions of Respondent's answer as "frivolous" does not come within the meaning of Section 102.21 of the Board's Rules and Regulations since that section deals only with the accountability of Respondent for failing to sign an answer or for filing an answer with the intent to defeat



the purposes of that section, or situations where scandalous or indecent matter is inserted.

## II. THE MOTION FOR SUMMARY JUDGMENT

Respondent opposes the General Counsel's Motion for Summary Judgment for the following reasons:

1. The central issue in the instant proceeding is whether the Certification of Representative issued to District 65, National Council of Distributive Workers of America, (hereafter referred to as "The Union") in Case No. 2-RC-15824 is invalid because the Regional Director and the Board erroneously overruled Respondent's objections to the election and erroneously overruled Respondent's challenges to the ballots of Maria Aviles, Soniz Morales and Carmen Valentin.

2. The Respondent filed eight objections to the election and presented a prima facie case establishing that the Union interfered with the election in the following respects:

a. In support of Objection No. 1 the Respondent presented evidence that established that the Union deliberately misrepresented its initiation fees, dues, and other financial obligations of employees to the Union. The Respondent also showed that the Union's pre-election claims that its Union Security Plan was in all its contracts was untrue, when the Union's own newspaper reported contract settlement without the Union Security Plan.

b. In support of Objections 2 and 4 Respondent presented evidence that the Union enlisted the services of United States Congressman Herman Badillo and Commissioner Irma Santaella to electioneer among the electorate on behalf of the Union, and that in the course of such electioneering Congressman Badillo made inflammatory racial statements and attempted to make the employees believe that

they would be benefitted with Federal building projects, which, in view of his Congressional position they might be led to expect.

c. Evidence provided in support of Respondent's Objections 3 and 6 demonstrated that the Union paid employees to appear as Union supporters and to obtain the support of other employees for the Union. Respondent submitted evidence that the Union made other promises of money and economic benefits to obtain the employees' support and also publicized plans for a victory party before the election results were known.

d. In support of Objection 5, Respondent submitted evidence which established that Union Representative Abreu engaged in electioneering in the "No Electioneering" area and while remaining in the restricted area during voting hours solicited others to electioneer during the times the polls were open.

e. In support of Objections 7 and 8, Respondent presented evidence which demonstrated that supervisors instigated, participated in and sponsored the Union and acted as members of the Union's Organizing Committee during the critical period prior to the election.

3. Although Respondent presented a prima facie case showing that the Union misrepresented its initiation fees, dues, and other financial obligations, and that its Union Security Plan was not in all of its contracts, the Regional Director overruled Respondent's objections without a hearing, accepting the Union's bald statements that its election promises regarding these matters were true.

4. The Respondent's objections regarding the activities of Congressman Badillo and Commissioner Santaella in acting as Union agents was never resolved, either by the Regional Director or the Board, and no hearing was ever held to consider the effects of the



inflammatory racial statements by Congressman Badillo and the effects of the partisan participation of high government officials on the employees' vote.

5. Despite the Respondent's prima facie case showing that the Union paid employees to appear as Union supporters and influence other employees in favor of the Union, and made other promises of money and things of benefit to obtain the employees' Union support, these objections were overruled on the basis of the Regional Director's ex parte determinations, and the Respondent was never accorded a hearing on these objections.

6. Although Respondent requested that, in accordance with well-established precedent, the representation proceeding be dismissed because of the activities of two acknowledged supervisors in the solicitation of Union authorization cards, arranging for, attending, and participating in Union meetings, urging and obtaining employee signatures on authorization cards, and enlisting employees to solicit and support the Union, the Regional Director refused to dismiss the proceedings solely on the ground that the objections based on the conduct of the supervisors were not raised within five working days of the close of the representation hearing. There is no provision in the Board's Rules and Regulations and Statements of Procedure publicizing this five-day rule. Respondent has been unable to find any publicized cases which refer to the five-day rule. Since the Respondent did bring the objectionable supervisors' conduct to the attention of the Regional Director more than a month prior to the election and requested an administrative investigation, the Regional Director's refusal to grant the Respondent a hearing or to consider this objection in reliance on the five-day rule, is reversible error.

7. Although the Board reversed the Regional Director and directed a hearing as to Objections 5 (activities of Union Representative

Abreu in the "No Electioneering" area) and 7 (Supervisors pro-union activities after the filing of the representation petition) Respondent was not given a fair hearing on these objections. The Respondent was denied administrative fairness and due process of law by the conduct of the Hearing Officer in refusing to permit Respondent to adduce evidence on critical issues, to have its own Spanish interpreter present when a Spanish-speaking witness testified, and in permitting Counsel for the Regional Director to participate in and question witnesses as an adversary, to make available affidavits of Respondent's witnesses to the Union without complying with Section 102.118 of the Board's Rules and Regulations and permitting Counsel for the Regional Director to make prejudicial statements without testifying under oath, and thereafter discrediting the testimony of Respondent's witnesses.

Further, even though the evidence adduced at the hearing covered a broad range of both legal and evidentiary issues, the Hearing Officer refused to permit Respondent to file a brief that would have brought to the Hearing Officer's attention the salient evidence and would have clarified the issues involved.

Consequently the Hearing Officer misunderstood the critical issues and evidence and made adverse credibility resolutions prejudicial to Respondent.

8. Respondent submits that it was denied administrative fairness and due process of law in the hearing on the challenges to the ballots of Maria Aviles, Soniz Morales and Carmen Valentin. The Hearing Officer credited the unsupported testimony of Carmen Valentin when the evidence on the record shows that she was contradicted in other respects by the Union's witnesses, and discredited without reason documentary evidence submitted by the Respondent, as well as the mutually corroborative testimony of Respondent's witnesses, Marks and De Leon.



With respect to the challenges to the ballots of Aviles and Morales, the Hearing Officer ignored the testimony of the Union's witness that there was a display department employee before Aviles and Morales. In overruling Respondent's challenges the Hearing Officer accepted the contradictory self-serving and inherently incredible testimony of Aviles and Morales and rejected, without reason, the testimony of Respondent's witnesses, Marks and Maguire, as well as the uncontradicted documentary evidence submitted by the Respondent.

Since the Hearing Officer refused to permit the Respondent to file a brief to explicate the delicate and essential credibility determinations and did not even offer the Respondent the opportunity to argue orally on the record, the Hearing Officer's erroneous findings, conclusions, recommendations and credibility resolutions on these matters must be considered directly attributable to such refusal.

The Board, in adopting the Hearing Officer's determinations pro forma has essentially denied the Respondent a hearing on these critical issues.

9. The Hearing Officer's determinations overruling the challenges to the ballots of Maria Aviles and Soniz Morales are erroneous as a matter of law. Since it is undisputed that Aviles and Morales were display department employees and the General Counsel contends that the voting unit specifically excludes display department employees the challenges to their ballots because they were display department employees should have been sustained.

10. The rule against relitigation of previously litigated issues does not apply in the instant case because Respondent was not given the opportunity in the prior representation case to fully litigate the issues raised by its objections and challenges.

Respondent respectfully submits that since it was denied a fair hearing on its objections and challenges in the underlying representation proceeding, Respondent would be severely prejudiced and denied due process of law if the General Counsel's Motion for Summary Judgment, which would deny Respondent a hearing in this Unfair Labor Practice proceeding, were granted.

WHEREFORE Respondent respectfully submits that for the reasons stated in Section I and II above the General Counsel's Motion for Summary Judgment must be denied and the case be noticed for trial.

Respectfully submitted,  
SELIGMAN & SELIGMAN

By /s/ Madeline Balk  
Attorney at Law  
Attorneys for Respondent  
Chrysler Building, 54th Fl.  
405 Lexington Avenue  
New York, N.Y. 10017

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[TRANSCRIPT OF PROCEEDINGS]  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
SECOND REGION

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In the Matter of

S. H. KRESS,

Employer

and

DISTRICT 65, NATIONAL COUNCIL  
DISTRIBUTIVE WORKERS OF AMERICA,

Petitioner

\*\*\*\*\*

Case No.  
2-RC-15824

26 Federal Plaza  
New York, New York  
Friday, March 10, 1972

The above-entitled matter came on for hearing, pursuant to  
notice, at 11:45 o'clock a. m.

BEFORE:

HOWARD SHAPIRO, Hearing Officer

APPEARANCES:

ALAN D. EISENBERG, ESQ.

SELIGMAN & SELIGMAN, ESQS.  
405 Lexington Avenue  
New York, New York  
Appearing on behalf of the Employer

MARIO ABREV &  
ABE COHEN

13 Astor Place  
New York, New York  
Representatives,  
Appearing on behalf of the  
Petitioner

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EXHIBITS

| <u>NUMBER</u>            | <u>FOR IDENTIFICATION</u> | <u>IN EVIDENCE</u> |
|--------------------------|---------------------------|--------------------|
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| No. 1 (Witness Williams) |                           | 4                  |

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PROCEEDINGS

HEARING OFFICER SHAPIRO: The hearing will be in order.

This is a formal hearing in the matter of S. H. Kress, Case No. 2-RC-15824, before the National Labor Relations Board. The Hearing Officer appearing for the National Labor Relations Board is Howard Shapiro. All parties have been informed of the procedures at formal hearings before the Board by service of a statement of standard procedures with a notice of hearing. I have additional copies of this statement for distribution if any party wishes more.

Will Counsel please state their appearances for the record, for the Petitioner?

MR. COHEN: Abe Cohen.

HEARING OFFICER: Mr. Abrev?

MR. ABREV: Mario Abrev.

HEARING OFFICER: For the Employer?

MR. EISENBERG: Alan D. Eisenberg with the law firm of Seligman & Seligman, 405 Lexington Avenue, New York, New York, 10017.

HEARING OFFICER: Could we get the other two gentlemen to state their appearances?



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INDEXWITNESSESDIRECT CROSS REDIRECT RECROSS EXAM

James W. Williams  
(S. H. Kress & Co.) 17

EXHIBITSNUMBERFOR IDENTIFICATIONIN EVIDENCEBoard's:

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in the sales of general merchandise. The only facility involved herein is the retail store at 1915 Third Avenue, New York, New York, 10029, hereinafter known as the Employer. During the past twelve months in the course of doing business the Employer's sales of merchandise exceeded 500,000 of which more than 50,000 worth of goods was purchased from suppliers located directly outside of New York State.

Mr. Eisenberg, is that a fair statement of the business and operations of the company?

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MR. EISENBERG: Yes, sir.

HEARING OFFICER: Mr. Eisenberg, on behalf of the company, do you admit that the company is engaged in interstate commerce within the meaning of the act as amended?

MR. EISENBERG: Yes, sir.

HEARING OFFICER: Is the correct and legal name of the company that by which it has been designated in these proceedings, to witness S. H. Kress & Company, the word company spelled out?

MR. EISENBERG: Yes, although I would note in Board Exhibit 1, the representation petition does not so indicate.

HEARING OFFICER: Would you like to move to amend it?

MR. EISENBERG: I think that is the obligation of the union, sir.

HEARING OFFICER: Mr. Cohen, would you move to amend the petition in that record?

MR. COHEN: I would.

HEARING OFFICER: Motion granted. Mr. Cohen, is the correct name of the Petitioner that which appears on the petition filed in this case, that is, District 65, National Council Distributive Workers of America?

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MR. COHEN: Yes.



HEARING OFFICER: Can it be stipulated that the Petitioner herein, District 65, is a labor organization within the meaning of the act as amended?

MR. EISENBERG: Upon information and belief, yes.

HEARING OFFICER: Do you so stipulate, Mr. Cohen, on behalf of the Petitioner?

MR. COHEN: Yes.

HEARING OFFICER: Mr. Cohen, how should the organization name appear on the ballot in the event an election is directed?

MR. COHEN: We would like it to appear as District 65, NCDWA.

HEARING OFFICER: I would like also to get on the record, Mr. Cohen, the affiliation of District 65, with whom is it affiliated?

MR. COHEN: National Council Distributive Workers of America.

HEARING OFFICER: Is that AFLCIO and CLC?

MR. COHEN: No, it is independent.

HEARING OFFICER: On the ballot itself, I believe it is Board policy to spell out the full name of the Petitioner in this case and then if it is desired, to put beneath it any abbreviation that the Petitioner may require.

MR. COHEN: We certainly don't need it spelled out and then abbreviated. I don't see why we can't just have it abbreviated. As I said earlier, District 65, NCDWA.

HEARING OFFICER: My understanding is that it is Board policy --

MR. COHEN: Leave out the initials. If you want to spell out the entire title, spell it.

HEARING OFFICER: Fine. Then do you agree on the ballot it should read, District 65, National Council Distributive Workers of America?

MR. COHEN: Will you tell me what I should do if I don't agree?

HEARING OFFICER: Off the record.

(Discussion off the record.)

Back on the record.

Mr. Cohen, is it the petition of the union that you represent a majority of the employees in an appropriate unit and are you making this claim now?

MR. COHEN: Yes, sir.

9 HEARING OFFICER: Mr. Eisenberg, does the company at this time decline to recognize the Petitioner as exclusive bargaining agent for the employees in the unit petitioned for until such time as it or they are asserted in an appropriate unit as determined by the Board?

MR. EISENBERG: Yes, and I would like to observe that at no point has Petitioner made a request for recognition.

HEARING OFFICER: Prior to the opening of the hearing the parties worked out the following unit statement:

Unit included all employees of the Employer at its store at 1915 Third Avenue, New York, New York, 10029, including cashiers, porters, maintenance, stock, food service and selling employees and office clerical employees. Excluded all display employees and all guards, professional employees and supervisors as defined in the act.

Mr. Eisenberg, do you so stipulate to that unit?

MR. EISENBERG: Yes.

HEARING OFFICER: Mr. Cohen?

MR. COHEN: Yes, sir.

10 HEARING OFFICER: Gentlemen, there is some disagreement on the inclusion of certain supervisory individuals and positions on the eligibility list and within the unit. Mr. Cohen, could I have the Petitioner's position on this matter?



MR. COHEN: Could I ask for a fifteen-minute recess at this time?

HEARING OFFICER: Is such a long recess necessary at this point or could we go off the record for some time and then come back on?

MR. COHEN: I wanted to go out and make a call and see if I could reach my attorney on this.

HEARING OFFICER: I would call a fifteen-minute --

MR. EISENBERG: I would object to a recess. I would have no objection to a recess being granted for a telephone call but this hearing was scheduled for eleven o'clock and I note for the record that it is now ten minutes after twelve and we should move forward.

Now, if Counsel was going to be present, he should have been here at eleven o'clock as I was.

HEARING OFFICER: What is the purpose of this call?

MR. COHEN: Mr. Hearing Officer, as you know, while we were off the record or before the hearing was officially opened, we had discussed the possibility of agreeing to the unit and to the eligibility

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list and the union sought to agree with the company's position in order to get an election. It is at the company's insistence that we are litigating this issue and I would like to discuss this with Counsel.

MR. EISENBERG: I would take exception to the position of Mr. Cohen that the company wished to litigate this. This is a dispute between both parties here. Now, if Mr. Cohen wishes to consult with Counsel, I suggest that the hearing be adjourned and Mr. Cohen can speak with Counsel and then we can re-schedule the hearing. I am making that motion at this time.

HEARING OFFICER: Motion denied. I suggest that we adjourn for lunch at this time, and Mr. Cohen can make any telephone calls he wishes to.

MR. EISENBERG: I again point out that this hearing was scheduled for eleven o'clock and it is now closing in on twelve-fifteen. I see no point in breaking for lunch, we have accomplished nothing today. If Mr. Cohen wishes an adjournment, I am willing to comply and return on another day. I see no point in breaking at this time.

12 MR. COHEN: We are not looking for an adjournment and I again repeat that prior to the opening of the hearing, the union made every effort to avoid this litigation and it is only at the insistence of the Employer's Counsel that we are having this litigation. We were prepared, as you know, to settle the question of the eligibility list in accordance with the company's requests.

HEARING OFFICER: Gentlemen, that is not the issue here. The issue is the appropriate time to adjourn for lunch and, I think, it is a good time now to adjourn because, I think, it is inevitable that we will adjourn at some time for lunch.

Mr. Eisenberg, your objection is overruled. We will adjourn for one hour and we will resume at one-fifteen at which time Mr. Cohen will have made his phone calls and we will take this up from there.

(Whereupon, at 12:15 o'clock p.m., the hearing adjourned for lunch.)

(Whereupon, at 1:20 o'clock p.m., the hearing resumed.)

HEARING OFFICER: On the record. Prior to the recess, a request was made of the Petitioner to state its position on the matter of supervisors. Before I allow the Petitioner to respond to that, let me just elaborate on the question involved:

13 Prior to the hearing, the parties supplied the Hearing Officer with the following information:



There is one store manager involved, Mr. James Williams; three assistant store managers, Lawrence Jones, W. Grotheer and Sylvester Irvin; and six department managers whose names are Margaret Gordin, Sophia Oliveri, Josie Guzman, Helen Kavasansky, Hayde Feliciano, and Noel Hernandez.

Mr. Cohen, the position of the Petitioner on the supervisory question?

MR. COHEN: We believe they should all be excluded.

HEARING OFFICER: Mr. Eisenberg, the position of the company?

MR. EISENBERG: The company believes they should also be excluded but because of various off the record discussions which took place prior to the institution of this hearing, the company feels that it is incumbent upon itself to introduce testimony on this point.

HEARING OFFICER: Off the record.

(Discussion off the record.)

On the record.

Mr. Eisenberg, would you please present your witnesses in support of your position?

14 MR. EISENBERG: Prior to that, sir, I would like to move that the witnesses be sequestered.

HEARING OFFICER: Off the record.

(Discussion off the record.)

Back on the record.

Mr. Eisenberg?

MR. EISENBERG: On the basis of an off the record discussion, I am advised by the Hearing Officer that the witnesses subpoenaed by the Petitioner will not testify and in view of that understanding I would, therefore, withdraw my request for the sequester.

HEARING OFFICER: Mr. Eisenberg, would you please call any witnesses you intend to call?

MR. EISENBERG: Yes, I just wanted to make one further statement before we proceed, which is, on the basis of the exploratory discussion again held off the record, the only issue that has definitely opened so far is on the supervisory status of certain individuals. I would like to make it clear to the Hearing Officer at this point, that on the basis of discussion that I have not yet had with Mr. Briar, there may be the possibility of one other issue and I will get back to the Hearing Officer before the end of the day on that point. I would

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like to call Mr. Williams on the question of the supervisory status of six supervisors.

Mr. Williams, take the stand.

JAMES W. WILLIAMS

was duly sworn by the Hearing Officer and testified as follows:

HEARING OFFICER: State your name and address for the record, please?

THE WITNESS: James W. Williams, 1915 Third Avenue, New York.

MR. EISENBERG: Prior to proceeding, Mr. Hearing Officer, I would like to offer the following stipulations, that Mr. Williams, Mr. Jones, Mr. Grotheer and Mr. Irvin are supervisors within the meaning of the act.

HEARING OFFICER: Mr. Cohen, do you so stipulate?

MR. COHEN: So stipulated.

HEARING OFFICER: Stipulation is accepted.

MR. EISENBERG: I would also propose that Mr. Hernandez is a supervisor within the meaning of the act.

MR. COHEN: So stipulated.



HEARING OFFICER: On that point, I would like to get some testimony on the record between the difference in duties between Mr. Hernandez and the other five supervisors.

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MR. EISENBERG: The basis for the display department being excluded is because the employees who spend their time in this department do not have a sufficient community of interest with the other employees on the basis of the following work requirements of that department, to witness:

Display department employees trim windows and make signs and that this work requires a certain amount of art talent and that this work requires a certain amount of past art experience and that the training for this job takes as much as six months wherein the training for the other jobs at the store in question take approximately one week and that no previous experience in work is required in the other jobs but is required in the display department and that the other jobs in the store do not require some amount of past training or background as opposed to the work performed in the display department.

For the foregoing reasons, I propose that the display department be excluded from any unit found appropriate by the regional director.

HEARING OFFICER: Mr. Cohen, do you so stipulate?

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MR. COHEN: So stipulated.

#### DIRECT EXAMINATION

Q. (By Mr. Eisenberg) Mr. Williams, state your name and address for the record, please? A. James Williams, 1915 Third Avenue, New York.

Q. By whom are you employed? A. S. H. Kress & Company.

Q. In what capacity? A. Manager.

Q. How long have you been at the store on Third Avenue?

A. Since January 7th.

Q. How long have you been with the company? A. Approximately fourteen years.

Q. How long have you served as a store manager?

A. Since 1964.

Q. Are there any assistant store managers in the store?

A. Yes.

Q. What are their names? A. Lawrence Jones, W. Grotheer and Sylvester Irvin.

Q. Would you describe the duties of yourself, Mr. Jones, Mr. Grotheer and Mr. Irvin, please, and by duties, I mean in what sense do you supervise the other employees? A. Well, our job is almost totally supervision, administration.

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Q. Are the four of you responsible for directing the work of these employees? A. We are responsible to see that it is done.

Q. Are the four of you responsible for making any actions dealing with discipline? A. Not too often, sometimes, yes.

Q. Will you describe the building where the store is located, please? A. It is a two-story building on the corner of 106th Street. It has a basement, it has a basement sales floor with a small amount of stock area. There is a street level floor, that is sales, strictly merchandising and food. There is a mezzanine office and there is a rest room there, too. Then the second floor is strictly stock rooms although there is the ladies lounge there.

Q. Directing your attention to the facilities located on the basement level, sir, how many -- strike that.

Directing your attention to the basement level, sir, who is Margaret Gordin? A. Mrs. Gordin is the department supervisor, department manager for housewares, paints, hardware.



- 19 Q. Do you mean home furnishings? A. Yes.
- Q. Where is she located? A. In the basement.
- Q. How many employees does she supervise? A. I think there are six.
- Q. Six or seven? A. Six or seven.
- Q. Who is Sophia Oliveri? A. She's department supervisor.
- Q. Also in the basement? A. Yes.
- Q. What departments does she supervise? A. Toys and pets.
- Q. How many employees does she supervise? A. Six.
- Q. Directing your attention to the street level, sir, who is Josie Guzman? A. Josie is a supervisor in the front part of the store with cosmetics, health and beauty aids, jewelry, clocks and optics, small ledger goods.
- Q. Does she also supervise the department in which wigs are sold? A. Yes.
- Q. How many employees does she supervise? A. Five, I think, there are.
- 20 Q. Who is Helen Kavasansky, please? A. She's the department supervisor for apparel, all ages and section.
- Q. This, too, is located on the street level; is that correct? A. Yes.
- Q. Who is Hayde Feliciano, please? A. Department supervisor for the rear part of the store. She has curtains, drapery hardware, domestics, shower curtains, fabric and sewing accessories and stationery.
- Q. What do you mean by "domestics," please? A. Domestics would be bedding, linens, towels.
- Q. And she, too, is located on the main floor? A. Yes.

Q. Now, we have stipulated, I believe, that Mr. Hernandez is a supervisor within the meaning of the act; would you describe the department or departments in which he supervises? A. Yes, there is a lunch counter with stools going down the northside of the store on the main floor. I think that there are approximately thirty stools, thirty to thirty-five stools where we have waitresses and staff. Then in the front of the store between the front entrance doors there is a stand-up snack bar where we serve piazzas, hot dogs and sodas.

21 Q. He is in charge of the food department? A. Yes.

Q. Directing your attention now to the mezzanine, sir, is there an office located on the mezzanine? A. Yes.

Q. And how many employees are employed in the office? A. In the office itself, two.

Q. Who supervises these employees? A. I do.

Q. Is that where you have your office? A. Yes.

Q. Do any other supervisors have their offices up in the office -- excuse me, desks in that office? A. Mr. Grotheer and Mr. Jones.

Q. We have not covered stock and maintenance, and where are they located, stock and maintenance employees? A. In the stock room and generally all over the store.

Q. Who supervises these employees? A. I do.

Q. I believe the only job classification we have not covered, if I am correct, is customer service. How many employees are employed in -- A. Two.

Q. They work on the main floor? A. Yes.

22 Q. What do customer service employees do? A. They direct customers as to where to find particular items, they are for information, more or less, refunds, lay-a-ways, packages, sales checks.



Q. Approximately how many employees are employed in the food service department? A. Nine.

Q. And approximately how many employees are employed in the stock and maintenance department? A. Five.

Q. Five or six? A. Yes.

MR. EISENBERG: Off the record.

(Discussion off the record.)

Back on the record.

Q. Directing your attention, now, Mr. Williams, and I make reference to only the following six employees in the discussion which follows and these six employees are -- I don't know if it is Miss or Mrs. so I will just use the last names, Gordin, Oliveri, Guzman, Kavasansky, Feliciano and Mr. Hernandez. Now, with reference to these six people, I ask you whether these six individuals have authority to recommend discipline? A. Yes.

23

Q. Would you explain it, please? A. They have the authority to recommend a layoff or an increase, a recall, if somebody is out and they come back.

Q. I am talking about discipline only, now. If these employees wish to reprimand another employee, would you have an independent investigation as to their decision to reprimand an employee? A. No.

Q. And this wouldn't be so even if there was a written warning put into the personnel file; is that correct? A. Yes.

Q. Now, with reference to the transfer of employees, do these six individuals have any authority to transfer employees from one job classification to another job classification in the departments they supervise? A. Within their jurisdiction, yes, in their departments, sir.

Q. Do the supervisors discuss this matter with you or could they act independently? A. They can act independently.

Q. You mentioned recalls, you said that the supervisors would have authority to recommend the recall of workers --

24 HEARING OFFICER: Excuse me, let's refer to these people as department managers and not supervisors, all right?

MR. EISENBERG: Yes, excuse me.

Q. Will you describe the authority of these departmental managers with regard to their authority to effectively recommend the recall of an employee? A. You mean to what extent they have it?

Q. Yes. A. If an employee has been out before -- we have on that it did happen to -- they can recommend that we bring back the employee if the employee appeared to be a good type of employee.

Q. Would you make an independent investigation of a departmental manager on the recommendation that an employee be recalled?

A. No.

Q. Have you been involved in such instances where a employee has been recalled, since you have been in the store?

A. Yes.

Q. Will you describe it for the Hearing Officer, please?

A. Yes, we needed another girl. I had been in the store for about a week or ten days, I guess, I asked the department manager who needed another girl if she had any ideas since she was new there. She said yes, there was a girl who worked there, she needed the job  
25 very badly, her husband had bad health. I said, "Let's call her up and give her a try."

Q. You say you spoke to a department manager about that?

A. Yes.

HEARING OFFICER: Who was that?



THE WITNESS: Mrs. Gordin.

Q. Do the departmental managers under discussion have the authority to recommend wage increases? A. They can, yes.

Q. What do you do when a departmental manager recommends a wage increase; do you accept it or do you investigate it, what is your procedure? A. We have to take a history of the person in consideration. If the person is due for a raise, they will get it.

Q. Have there been instances where you have accepted the recommendation of a departmental manager without making an independent investigation of the wage increase? A. Not in this store because I have only been there two months.

Q. But in the past you have? A. Yes.

Q. And that is your understanding with respect to departmental managers? A. Yes.

Q. With reference to discharges, sir, what is your policy with reference to the departmental manager's authority for discharge for insubordination? A. I have encouraged this. If there is insubordination they have full authority to dismiss the person.

Q. Would that have to be cleared by you? A. Not for insubordination, no.

Q. I direct your attention to the matter of the direction of work of the employees in the store. Will you describe for us, please, the direction of work, if any, which the supervisors engage -- excuse me, the departmental managers engage? A. They have the authority to assign work schedules, they assign the breaks, the lunch periods, they are in charge of vacation schedules, they are responsible for seeing that the employees in their areas fill the counters, straighten the counters, pull the stock necessary. The departmental managers also are responsible for the ordering. In general, the total area they are responsible for, counter displays.

Q. By "responsible," do you mean that they direct the workers in doing these duties? A. Yes.

27 Q. You have indicated that they are responsible for breaks; will you explain that in some detail? How does an employee take a break? Is permission required of the departmental manager? A. Before they leave the floor?

Q. Yes. A. Yes.

Q. What is the story on lunch periods, is permission required of the departmental manager to take a lunch break or is the schedule fixed in advance? A. Before the departmental manager goes to lunch?

Q. No, the employees within the departmental manager's department? A. Originally when an employee is hired the departmental manager sets-up the lunch period. After that it is pretty much routine unless there is an employee out or a girl's day off or else they are working a different schedule, an early schedule or late schedule, depending upon breaks, they would have to change it then.

Q. And under those conditions the departmental managers would have to change the schedule? A. Yes.

Q. Do the breaks vary or are they the same from day to day? A. They are generally the same. If someone is out, or if the area is too busy, the departmental manager has the authority to change the break.

28 Q. Who assigns the day off? A. Department managers do that.

Q. Who assigns vacation? A. The employees request a vacation period, the supervisors correspond the vacations so there is no overlap in the vacations and if there is an overlap, they are given right back to the supervisors to straighten it out.



Q. Will you tell us whether or not employees are transferred from counter to counter within a departmental manager's department depending upon the flow of traffic within the department?

A. Yes.

Q. That is done regular; is that correct? A. Yes.

Q. And who is responsible for training new employees --

A. The supervisor in the area.

Q. By "supervisor," you mean the departmental manager?

A. Yes.

Q. What is the change box, sir? A. That is a locked box -- they have a few on the sales floor, both floors with coins and singles for change. In case a girl needs more quarters, the supervisor will give her more quarters out of the box.

Q. Who has the keys to the box? A. The departmental managers.

29 Q. Have you ever had any conversations with a department manager concerning their responsibility to direct work rather than work themselves? A. Yes.

Q. What have these instructions been to the departmental managers? A. Their job is to get the job done. They have girls who work for them and they have to make sure that it gets done.

Q. Do the departmental managers go to work themselves? A. Yes.

Q. Based upon your personal observation, can you state to us what percentage of time is spent supervising and what percentage is spent working? A. I would say there is --

Q. Would you say they supervise in excess of fifty percent? A. Yes.

Q. Would you say they work less than fifty percent? A. Yes.

Q. Have you held any supervisory meetings since you have been in the store? A. Yes, two.

Q. Excuse me. A. Two.

30 Q. And the six people in question, did they attend those meetings? A. Yes.

Q. And I take it Mr. Jones also attended that meeting? A. Yes.

Q. And Mr. Grotheer also attended that meeting? A. Yes.

Q. Was Mr. Irvin in the store at that time? A. No, he has only been there a short time.

MR. EISENBERG: You may inquire.

MR. COHEN: I have no questions.

HEARING OFFICER: Mr. James, can you describe for the Hearing Officer your duties as store manager?

THE WITNESS: To supervise and to properly date and follow-up the flow of work.

HEARING OFFICER: What do you mean by "supervise," what do you specifically do, what are you responsible for?

THE WITNESS: All phases of the store operation.

HEARING OFFICER: Can you explain to me the duties and responsibilities of an assistant store manager, that is, are they about the same as yours?

THE WITNESS: Yes.

31 HEARING OFFICER: Can you explain what they do and how it differs from what you do?

THE WITNESS: Mr. Jones is responsible for all phases of operations of the main floor; Mr. Grotheer for the basement and Mr. Irvin is working with Mr. Jones on the main floor in the same capacity. The only difference in work is if they need to, they can pitch in and help once in a while but they should have to do very little physical work.



HEARING OFFICER: Is the ultimate responsibility for the decisions at the store yours?

THE WITNESS: Depending upon the decisions that have to be made.

HEARING OFFICER: Are decisions made by the supervisors that you have no say?

THE WITNESS: No. It depends upon the situation. He can order merchandise, he can handle customer complaints, he can direct work that I don't have to be advised of. So he makes decisions without me, yes.

HEARING OFFICER: How about dealing with the personnel, would the employees reprimand any workers, what is the flow decisions in that instance?

32 MR. EISENBERG: I think we ought to have a more specific question as to what you mean.

HEARING OFFICER: In the instance in which an employee is liable to be discharged for poor work or something like that, where does the decision or recommendation to discharge that employee begin and who makes the ultimate decision as to that discharge?

THE WITNESS: The department manager is responsible for making that decision.

HEARING OFFICER: Is that a final decision that he or she can make by themselves?

THE WITNESS: Yes.

HEARING OFFICER: And the assistant store manager doesn't review that decision or does he normally review it?

THE WITNESS: Depending upon the circumstances of a person's past history.

HEARING OFFICER: In your experience at this store as manager, have supervisors been made to discharge any employees?

THE WITNESS: Yes.

33 HEARING OFFICER: Could you tell me what were the circumstances of the discharge, what type of fault at work was alleged to have occurred and if that decision went higher than the department manager?

THE WITNESS: Yes.

HEARING OFFICER: Could you please tell me?

THE WITNESS: Yes, there is one decision that was recommended to me and discussed with me and I did work with the supervisor on a lay-off. Do you want me to go into detail on a termination?

HEARING OFFICER: You can state simply over what kind of problem it was.

THE WITNESS: We had a young lady who had been in an auto accident. She was working for us once, left and then re-hired. During the time she was out she was in a car accident and damage was done to her brain, I assume, I was told that. And it was very evident in her work. The manager told me that he had re-hired her for Christmas and that he had planned to lay her off after Christmas. Everything that the girl counted had to be recounted.

HEARING OFFICER: Aside from that one, have you had any other instances of discharge?

THE WITNESS: Well, that was a termination. An actual discharge, the termination was made by the assistant manager but I did the actual firing.

HEARING OFFICER: Did the department manager --

34 THE WITNESS: It was the department manager who made that decision, the person was fired.

HEARING OFFICER: The department manager --

THE WITNESS: The department manager was fired, that is what I meant to say.



HEARING OFFICER: Aside from these two instances, have there been any other instances of discharge or lay-off since you have been there?

THE WITNESS: No.

HEARING OFFICER: Who hires applicants, who has the ultimate decision to hire?

THE WITNESS: I do.

HEARING OFFICER: Do you interview the applicants themselves?

THE WITNESS: Yes.

HEARING OFFICER: Do assistant managers do any interviewing?

THE WITNESS: They are qualified to. I haven't been there long enough to -- to my knowledge they haven't. They do have the authority to do the interviewing and they can recommend someone to me.

HEARING OFFICER: Who makes decisions if it is necessary in the store to transfer employees from one department to another, has that occurred?

35 THE WITNESS: Yes. Because within a particular supervisor's area, she may make that decision.

HEARING OFFICER: That is within a department; is that right?

THE WITNESS: Within an area. Each supervisor has several departments --

HEARING OFFICER: You mean each department manager has several departments?

THE WITNESS: Yes.

HEARING OFFICER: How about between the jurisdictions?

THE WITNESS: No, then I make that decision myself.

HEARING OFFICER: Have department managers recommended pay raises or bonuses to any of their employees, to you?

THE WITNESS: Not since I have been in the store. They do have the authority, though.

HEARING OFFICER: What is the name of the previous store manager before you came in?

THE WITNESS: T. H. -- may I ask Mr. Briar?

HEARING OFFICER: Yes.

(Witness confers with Mr. Briar.)

THE WITNESS: It is Wiggs.

HEARING OFFICER: Would you know first-hand whether he accepted recommendations from department managers --

MR. EISENBERG: Objection, how could he know first-hand?

HEARING OFFICER: Objection sustained.

Did you ever talk to Mr. Wiggs about problems that he had?

THE WITNESS: Yes.

HEARING OFFICER: Did you ever meet the gentleman?

THE WITNESS: Yes.

HEARING OFFICER: Do you have any direct knowledge of what he did as store manager?

THE WITNESS: Well, --

MR. EISENBERG: Mr. Hearing Officer, it is clear that the witness was not in the store prior to taking over.

HEARING OFFICER: I would like to determine whether Mr. Wiggs and Mr. Williams ever had any conversations as to what took place in the store.

MR. EISENBERG: It would all be hearsay and it is not a proper line of questioning.

HEARING OFFICER: Objection sustained. Could you refresh my memory, how many months have you been store manager?



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THE WITNESS: Two months, I went there January 6th or 7th.

HEARING OFFICER: Do department managers give warnings to their employees as far as possible terminations or lay-offs with regard to faulty work or absences?

THE WITNESS: They are authorized to, yes.

HEARING OFFICER: Have you spoken to them about such matters?

THE WITNESS: No.

HEARING OFFICER: The total number of employees except supervisors in this store is about how many?

THE WITNESS: Approximately fifty.

HEARING OFFICER: Are there are approximately ten managers of various sorts?

THE WITNESS: Yes.

HEARING OFFICER: Is each work area under the supervision of a department manager separated by much distance from other work areas or are they in rather close relationship to each other?

THE WITNESS: They are in close relationship.

HEARING OFFICER: Do employees in one department within the jurisdiction of one department manager look to other department managers for advise, leadership, direction of any sort or are they looking only to their own department manager?

38

THE WITNESS: To their department manager.

HEARING OFFICER: Who is responsible for the instruction of any new employees in their duties?

THE WITNESS: The supervisor in the area that a new employee is assigned to.

HEARING OFFICER: That is the department manager?

THE WITNESS: Yes.

HEARING OFFICER: Who does an employee come to with a grievance concerning his work?

THE WITNESS: They should go and generally they do go to their supervisors.

HEARING OFFICER: To their department managers?

THE WITNESS: Yes.

HEARING OFFICER: Do you know of any concrete examples of any grievances raised by employees?

THE WITNESS: Not to their supervisors. I have had one or two come to me but that is all.

HEARING OFFICER: Those one or two who came to you, did they mention that they had gone to their department managers first?

THE WITNESS: No.

HEARING OFFICER: Did they mention that they came to you first for any specific reason?

THE WITNESS: No.

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HEARING OFFICER: What is the method of pay of these different categories of managers; are they paid by the hour, weekly, or yearly?

THE WITNESS: Which?

HEARING OFFICER: The store manager.

THE WITNESS: Monthly.

HEARING OFFICER: Assistant store managers?

THE WITNESS: Monthly.

HEARING OFFICER: Department managers?

THE WITNESS: Bi-weekly.

HEARING OFFICER: How about non-supervisory employees?

THE WITNESS: Bi-weekly.

HEARING OFFICER: That means they get their check every two weeks?

THE WITNESS: Yes.

HEARING OFFICER: Are they paid by the hour?



THE WITNESS: Yes.

HEARING OFFICER: Without necessarily telling me the salary of managers as opposed to non-supervisory employees, what is the percentage difference between the general or average salary of non-supervisory employees and these department managers; if you can give me a percentage difference?

40

THE WITNESS: I couldn't, it depends upon the experience, it depends upon the length of time with the company.

HEARING OFFICER: Given the hypothetical case of a new employee, a sales girl and her equally new department manager, what would be the difference of salary of those two people?

THE WITNESS: If they were both new?

HEARING OFFICER: Yes, although a department manager has some experience in order to be a department manager.

THE WITNESS: I would say \$25.00 to \$30.00 an hour more.

HEARING OFFICER: On an eight-hour day it figures out to approximately \$23.00 a day or about \$15.00 a week?

THE WITNESS: I guess. I don't know the figures offhand, you are doing the figuring.

HEARING OFFICER: Your department managers are each at different level of salary at this time?

THE WITNESS: Yes.

HEARING OFFICER: And various employees differ according to the jobs they do?

THE WITNESS: Yes.

HEARING OFFICER: Are department managers expected to work overtime or do they work overtime?

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THE WITNESS: During an inventory, yes.

HEARING OFFICER: Are any other employees working overtime during an inventory?

THE WITNESS: Yes.

HEARING OFFICER: Who would that be?

THE WITNESS: Everyone.

HEARING OFFICER: Are there any other times at which department managers work overtime?

THE WITNESS: Not to my knowledge, no.

HEARING OFFICER: Do the assistant store manager and store manager work more than the department managers and employees?

THE WITNESS: Yes.

HEARING OFFICER: Does the department manager have a set hourly -- a set weekly total of hours that he or she works?

THE WITNESS: Yes.

HEARING OFFICER: What is that?

THE WITNESS: Thirty-seven-and-a-half.

HEARING OFFICER: And employees work how many hours?

THE WITNESS: Depending upon their status. The general full time employee is thirty-seven-and-a-half.

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HEARING OFFICER: And the average weekly hours of the assistant store manager?

THE WITNESS: About fifty-four hours a week.

HEARING OFFICER: Off the record.

(Discussion off the record.)

Back on the record.

THE WITNESS: That is a minimum, by the way, the hours I just mentioned are for assistant managers, that is a minimum.

HEARING OFFICER: Off the record.

(Discussion off the record.)

Back on the record.

Mr. Williams, at present are there any employees who are display workers, full time?



THE WITNESS: No.

HEARING OFFICER: At present who does the display work for the store?

THE WITNESS: Do you mean in it or for it? It depends --

HEARING OFFICER: In the store.

THE WITNESS: In the store the department supervisor is responsible for her area, for display.

HEARING OFFICER: The department manager?

THE WITNESS: The department manager.

43 HEARING OFFICER: And the production number of employees in the unit as the parties stipulated to --

MR. EISENBERG: He has already said fifty, Mr. Hearing Officer.

HEARING OFFICER: Did you say fifty? Repeat it for the record.

THE WITNESS: Approximately.

HEARING OFFICER: And there are also approximately five supervisors in question?

MR. COHEN: In question by whom?

HEARING OFFICER: In question or discussed by Mr. Eisenberg. You may step down, Mr. Williams.

MR. EISENBERG: I have a question.

HEARING OFFICER: Go ahead.

Q. (By Mr. Eisenberg) The Hearing Officer asked you about the display and you indicated that each departmental manager is responsible for the display in that department. I think you may have misunderstood the question or, at least, I misunderstood the question, somebody misunderstood it. Who is responsible for the display in the windows? A. At the present time, Mr. Grotheer.

MR. EISENBERG: Nothing further.

HEARING OFFICER: Anything further of this witness? You may step down.

(Witness excused.)

44 HEARING OFFICER: Mr. Eisenberg, is there anything further that you wish to add?

MR. EISENBERG: Not of this witness. May I have a short recess, please?

HEARING OFFICER: How long?

MR. EISENBERG: Five minutes.

HEARING OFFICER: Off the record.

(Discussion off the record.)

On the record.

Mr. Eisenberg, do you wish to call any further witnesses?

MR. EISENBERG: No, sir.

HEARING OFFICER: Do you wish to add anything further to your presentation?

MR. EISENBERG: Not at this time.

HEARING OFFICER: Mr. Abrev, may I have the name of a company official -- Mr. Eisenberg, may I have the name of a company official upon whom papers may be served?

MR. EISENBERG: What kind of papers?

HEARING OFFICER: Board papers.

MR. EISENBERG: Steven Briar, he made an appearance at the beginning of this hearing.

HEARING OFFICER: Could you please just state it out loud?

45 MR. EISENBERG: Steven Briar, Director of Manpower, 114 Fifth Avenue, New York, New York.

HEARING OFFICER: Off the record.

(Discussion off the record.)

Does the company desire to file a brief?



MR. EISENBERG: Yes, sir.

HEARING OFFICER: How many days would you request?

MR. EISENBERG: As I understand it, your authority is to grant me fourteen days from today which I would like.

HEARING OFFICER: You may have fourteen days. Does the Petitioner wish to file a brief?

MR. COHEN: No, we don't wish to file a brief nor can we understand why it is going to take the company fourteen days to file a brief in this case based on the record that has been compiled thus far.

MR. EISENBERG: Because I have other commitments that will keep me out of town all of next week.

HEARING OFFICER: Mr. Eisenberg has made a request and it has been granted. If there is nothing further, the hearing will be closed. The hearing is now closed.

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# United States Court of Appeals

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,  
*Petitioner,*

v.

S. H. KRESS COMPANY,  
*Respondent.*

No. 74-1762

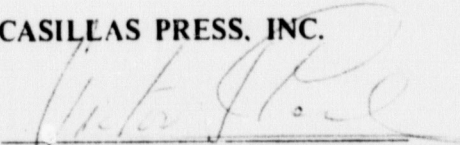
## CERTIFICATE OF SERVICE

I hereby certify that I have served by hand (by mail) two copies of the  
APPENDIX in the above-entitled case, on  
the following counsel of record, this 20th day of September 1974.

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Subscribed and Sworn to before me this